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ABSTRACT

This paper provides an analysis of the basis for and clarity and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I of ESEA. Specifically, this paper, which is the first of 5 papers to be prepared by the Legal Standards Project, is concerned with the following: (1) the basis for the requirements which local educational agencies (LEAs) must comply with in order to receive benefits under Title I (LEA program requirements), (2) whether the language of the federal legal framework setting forth the basic LEA program requirements is sufficiently clear, (3) whether the basic LEA program requirements restrict LEAs in the design of innovative programs for and the delivery of services to educationally deprived children residing in low-income areas, and (4) whether the legal frameworks developed by the states are sufficiently clear and whether they restrict the design of innovative programs. The paper is divided into three parts. Parts I and II set forth the general purposes, basic definitions, and the conclusions and recommendations concerning the necessity, clarity and restrictiveness of the overall federal legal framework. Part III includes an in depth analysis of the necessity, clarity, and restrictiveness of each major program requirement. Descriptions of the relevant sections of the existing federal legal framework, the legal frameworks developed by the states included in the survey, and the project's analysis concerning the efficacy of the existing federal legal framework are included. (Author/AM)

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AN ANALYSIS OF THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF THE PROGRAM REQUIREMENTS APPLICABLE TO LOCAL SCHOOL DISTRICTS APPLYING FOR GRANTS UNDER TITLE I OF ESEA

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PART I

INTRODUCTION AND OVERVIEW OF THE PAPER

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PART I
INTRODUCTION AND OVERVIEW OF THE PAPER

I. Purpose of the Paper

On April 11, 1965, Congress enacted the Elementary and Secondary Education Act[1] (ESEA) which was designed to expand educational opportunities in the nation's elementary and secondary schools. "Title I"[2] of that Act provides financial assistance to local educational agencies[3] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Later amendments have "set aside" certain amounts of Title I funds for handicapped children,[4] Indian children,[5] agricultural migrant children,[6] children in institutions for the neglected and delinquent children,[7] and children of migratory fishermen.[8]

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[1] P.L. 89-10 (20 U.S.C. 241a *et. seq.*)

[2] "Title I" of ESEA was originally designated "Title II" of P.L. 81-874 (1950) pertaining to Federal aid to impacted areas. In January, 1968 Congress redesignated the enabling legislation as Title I of ESEA.

[3] The term "local educational agency" means a "public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or such combination of school districts or counties as are recognized ina State as an administrative agency for its public elementary or secondary schools . . ." Section 403 (6)(B) of P.L. 81-874.

[4] P.L. 89-313 (November 1, 1965).

[5] P.L. 89-750 (November 3, 1966).

[6] *Id.*

Congress, in the Education Amendments of 1974 (1974 Amendments), extended the Title I program through June 30, 1978. The 1974 Amendments also mandated that the National Institute of Education (NIE) undertake a study of compensatory education programs, including Title I and report the findings to Congress with recommendations concerning future federally funded compensatory and remedial education programs.

One aspect of the NIE study is an examination of the administration of Title I by the states.[9] This is an important subject because the Title I statute confers major responsibilities for the administration of Title I on State Educational Agencies[10] (SEAs). Central to the study of program administration and to any conclusions concerning the future of federal compensatory education efforts is an understanding of the legal framework of Title I. This legal framework includes program requirements which specify how Title I programs are to be designed and how federal funds are to be used by LEAs which receive Title I funds, thereby defining the objectives of Title I program administration. The legal framework also includes the respective functions which SEAs and the United States Office of Education (OE) are to perform in the administration of Title I. The National Institute of Education has contracted with the Lawyers' Committee for Civil Rights Under Law to conduct the "Compensatory Education Study - Survey of Legal Standards" (Legal Standards Project) which is to describe and analyze the legal framework of Title I and State compensatory education programs.

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[7] Id.

[8] P.L. 93-380 (August 21, 1974).

[9] Section 821 of the 1974 Amendments (20 U.S.C. 1221c note). See Research Plan: Compensatory Education Study (December 16, 1974) National Institute of Education.

[10] The term "State educational agency" means the officer or agency primarily responsible for the state supervision of public elementary and secondary schools. Section 403(7) of P.L. 81-874.

The study's basic research objective is to determine what additions, deletions, or clarifications are needed to the present federal legal framework in order to improve program administration.

Specifically, this paper, which is the first of five papers to be prepared by the Project, is concerned with (a) the basis for the requirements which LEAs must comply with in order to receive benefits under Title I (LEA program requirements) (b) whether the language of the federal legal framework setting forth the basic LEA program requirements is sufficiently clear; (c) whether the basic LEA program requirements restrict LEAs in the design of innovative programs for and the delivery of services to educationally deprived children residing in low-income areas; and (d) whether the legal frameworks developed by the states are sufficiently clear and whether they restrict the design of innovative programs?

For purposes of this paper, a requirement is considered to be "unclear" if the full range of acceptable and unacceptable practices under Title I cannot be comprehended by thoughtful consideration of the language of the provision and its context in the statute or regulations.

For purposes of this paper, a requirement is considered "overly restrictive" if, although consistent with the Title I statute and legislative history, it places burdens on LEAs not necessary to accomplish the stated policy.

A second paper analyzes the clarity and sufficiency of the sections of the Title I legal framework prescribing the administrative responsibilities SEAs must perform.[11]

A third paper analyzes the relationship between Title I and selected state compensatory education programs.[12]

A fourth paper describes the present Title I legal framework, as modified by the revised regulations published in the Federal Register on September 28, 1976.[13]

The fifth paper contains an overview of the Project's major findings, conclusions and recommendations set forth in the first paper.[14]

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[11] "An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965" (September, 1977, approximately 500 pages).

[12] "A Description and Analysis of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs," (September, 1977, approximately 300 pages).

[13] 41 FR 42895-42923 (September 28, 1976). This paper is entitled, "A Description of the Title I, ESEA Legal Framework" (September, 1977, approximately 200 pages).

[14] "An Introductory Overview Concerning the Basis for and Clarity and Restrictiveness of Program Requirements Applicable to School Districts Applying for Grants Under Title I, ESEA."

II. Limitations of This Paper

There are several aspects of the Title I legal framework which are not considered either in this paper or elsewhere in the Lawyers' Committee study. First, this study does not describe or analyze those requirements pertaining to Title I programs funded from special Title I "set asides" for handicapped children, Indian children, agricultural migrant children, children of migratory fishermen, or children in state institutions for neglected and delinquent children. Nor does this study consider those sections of the legislation and regulations which do not pertain directly to requirements which LEAs must meet or to functions which SEAs and OE are required to perform under Title I, e.g., special incentive grants, and the establishment of a National Advisory Council for the Educationally Disadvantaged. Further, we do not analyze the legal requirements concerning the operation of Title I programs in private schools. Each of these areas, though relevant, is beyond the scope of this study.

It should be noted that the Title I regulations in existence during our interviews were superseded by a new set of regulations published in the Federal Register on September 28, 1976. Because of the timing of their publication, it was impossible for the Project to include in this draft of our paper an analysis of these revised regulations.

The Legal Standards Project was not asked to analyze the feasibility of developing alternatives to the basic policies and categorical aid structure of the existing Title I legal framework. We were not asked to analyze, for example, (a) the advantages and disadvantages of repealing Title I and enacting block grant legislation, or (b) the Title I policy of targeting only those areas in a school district having high concentrations of children from low-income families. Instead, our task was to analyze the basis for and the clarity and restrictiveness of the existing Title I legal framework.

To the extent a statutory provision is unclear or overly restrictive, we propose appropriate modifications, additions or deletions. Similarly, to the extent we found that an OE requirement was inconsistent with the Title I statute, unclear or overly restrictive, we recommend changes to ameliorate such problems.

We propose no changes to regulations found to be consistent with the statute, clear and non-restrictive, even though an alternative interpretation might also be consistent with the statute and legislative history. For example, since 1968 OE regulations have defined "areas having high concentrations of children from low-income families" as those areas having a percentage or number of children from low-income families as high or higher than the district-wide average. Since the standard is clear, and, when read in conjunction with other provisions in the regulations, not overly restrictive given the less than full funding of Title I, we have not recommended that OE adopt an alternative definition, although other definitions might also be consistent with the Title I statute.

In certain cases, the limitations of our expertise or the need for empirical data prevent us from making specific recommendations. In such cases, we have limited our role to identifying issues requiring further analysis and decisions by others.

We did not study in depth the activities of the HEW Audit Agency (HEWAA) regarding Title I. On several occasions, though, SEAs and LEAs expressed to us the opinion that HEW auditors had made unnecessarily restrictive interpretations of the law. It is important that the merits of these contentions be studied. In this paper we offer certain hypotheses concerning these contentions, infra, at p. 71; but the perspective of the HEW

Audit Agency is a subject that will be addressed by other NIE grantees and, thus, is not explored here.

With respect to our analysis of the states' legal frameworks, it is important to note that our study is only concerned with state policies. Whether a particular state policy is diligently enforced in actual practice is beyond the scope of the project. This limitation is not, for our purposes, a deficiency. The analysis of state policies offers valuable insights concerning the variety of possible interpretations of the federal requirements. It is also a source of ideas for improving those requirements.

This introduction and overview does not analyze in detail any particular Title I requirement. Such an analysis appears in Part III of the paper.

III. Research Methodology

To achieve our basic research objectives, the Legal

Standards Project studied the federal Title I legal framework and the Title I legal frameworks of ten states.

The states selected by NIE and the Legal Standards Project included: (a) states which have enacted state compensatory education programs; (b) approximately one state from each of the HEW regions; (c) at least one state from each of the following categories -- large urbanized, large rural, small urbanized, small rural; (d) states which had actively interpreted Title I and states that had not; (e) states that have been cited as having model systems for the administration of Title I, and (f) states which have been severly criticized by OE and HEWAA.

The Project reviewed written policy statements developed by the states, and preliminary determinations were made concerning, among other things, (a) the substance and extent of state regulation, and (b) the comprehensiveness, internal consistency, and specificity of these state regulations, and their consistency with the federal legal framework.

In addition to studying the states' legal frameworks, we spent approximately one week in each state interviewing a wide range of state officials responsible for the administration of Title I, including State Title I Directors, their staffs, State Auditors, and legal counsel. These interviews were conducted between December, 1975 and March, 1976.

During the interviews conducted in the ten states we attempted to determine: (a) the accuracy of our preliminary analysis; (b) state interpretations concerning areas which, based on a preliminary reading of the Title I statute, regulations, guidelines, and handbooks might be thought to be ambiguous; (c) perceived problems with the legal framework; and (d) areas which SEAs felt were most important to the effectuation of the purposes of Title I.

During our study, we also visited at least one LEA in each state. These LEAs were selected for their particular characteristics, e.g., rural, urban, or recently desegregated. These LEAs explained the operation of Title I in their districts. No attempt was made to analyze the veracity of their comments. NIE will be addressing questions related to LEA perceptions under a separate contract.

Following our site visits, we prepared notebooks describing the states' policies with respect to each LEA program requirement, including appendices containing copies of written materials developed by the states. For example, regarding the "supplement, not supplant" provision,[15] we determined which of the ten states, if any, allow a child participating in a Title I program to be "pulled-out"[16] of a regular class for the entire day to receive services funded entirely under Title I.

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[15] This provision is described infra, at p. 32.

[16] For purposes of this paper a pull-out program is one in which an educationally deprived child receives his/her special assistance under Title I in a location other than the regular classroom.

With respect to targeting of children[17] we determined whether the states allow LEAs to select children achieving below their potential, even if their achievement level is at or above their appropriate grade in school.

The sections of this report describing the state legal framework are based on our analysis of written state policies and oral interpretations made by those we interviewed.

It should be noted that this paper does not identify any of the states included in our survey by name nor does it attribute information to specific individuals. The Legal Standards Project and NIE agreed that because of the nature of our inquiry it would be advisable to enter into confidentiality agreements with the states. We believe that such an arrangement does not detract from the utility of the paper since we are analyzing the efficacy of the federal legal framework not those of the states.

IV. Organization of this Paper

This paper is divided into three parts. Part I is the general introduction. Part II includes the Project's findings, conclusions, and recommendations concerning the basis for and clarity, and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I. The focus of Part II is on the efficacy of the existing federal legal framework in general. Part II does not consider the basis for and clarity and restrictiveness of any particular requirement.

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[17] The targeting of children requirement is described *infra* at p. 28.

Part III of this paper includes an in-depth analysis of each of the major LEA program requirements. This part is divided into chapters. Each chapter describes the basic federal and state legal frameworks pertaining to the relevant program requirement under discussion and then analyzes the basis for and clarity and restrictiveness of the requirement. These analyses will include our recommendations concerning the specific additions, deletions or modifications to the federal legal framework which will improve the overall administration of Title I.

V. Definitions of Major Terms

A. Introduction

Throughout the paper reference is made to certain terms describing the federal and state documents pertaining to the basic LEA program requirements. These terms are defined below. This section also describes in general the basic LEA program requirements analyzed in this paper.

B. The "Federal" or "Title I Legal Framework"

For purposes of this paper the federal or Title I legal framework includes all documents constituting the "formal" and "informal" legal framework. These terms are defined immediately below.

C. The "Federal Formal Legal Framework"

Whenever Congress enacts new legislation distributing federal funds, a formal legal framework must be developed to specify the requirements and conditions governing the receipt of benefits under the legislation. For purposes of this paper, the Title I "formal legal framework" includes the requirements appearing in the Title I legislation (Title I) and the General Education Provisions Act (GEPA), as well as the regulations officially promulgated by OE which were originally published in the Federal Register (FR) and subsequently codified in the Code of Federal Regulations (CFR). A regulation is a general rule issued by a government agency pursuant to an Act of Congress delegating such "rulemaking" authority to the agency. These regulations are considered to have the "full force of law."[18] This means that a requirement issued as a regulation is as legally binding as a federal statute -- so long as it is within the scope of the agency's delegated power.

In the paper there are references both to "regulations" and to "proposed regulations." The distinction can be explained by describing the process by which a regulation is promulgated. Under the General Education Provisions Act (GEPA), all Title I

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18 / See Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942).

regulations must first be published in the Federal Register as proposed regulations. During the thirty-day period following this publication, the United States Commissioner of Education (Commissioner) must offer interested persons an opportunity to comment upon the proposed regulations. Following the thirty-day comment peric the Commissioner may (a) decide not to adopt the proposal as a final regulation; (b) adopt the proposed regulation in a modified form; or (c) finally adopt the regulation as originally proposed, without modification.

If the agency decides to adopt a regulation[19] as final, either as originally proposed or as modified, it must republish the regulation in the Federal Register. Once each year, the regulations which have finally been adopted by OE are republished in Title 45 of the Code of Federal Regulations (cited as 45 C.F.R.).

In sum, the Federal Register is generally used by federal agencies to publish both proposed regulations and finally adopted regulations. The Code of Federal Regulations contains only the finally adopted regulations.

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[19] Section 431 of GEPA (20 U.S.C. 1232). The term "regulation" in accordance with the Education Amendments of 1976, is defined in Section 431 of GEPA to include "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication in the Federal Register of a regulation, must transmit to Congress a copy of the regulation which will generally become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

In addition to the statute and regulations, the formal legal framework in effect during our interviews included "criteria" developed by OE which appeared in program guides issued by OE (renamed "Program Instructions", these guides were part of OE's Program Directive System). Although these guidelines were widely disseminated, they were never published in the Federal Register.[20]

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[20] It should be noted that the legal status of these guidelines in effect during our interviews is uncertain in light of Section 503 of P.L. 92-318 and Section 431 of GEPA. Section 503 provides, among other things, that OE conduct a "study" of all published policy pronouncements, including OE "criteria" or guidelines, and then publish the results of this study in the Federal Register. This study was to be completed in 1973. As explained supra, Section 431 of GEPA (20 U.S.C. 1232) generally provides that (1) all "regulations" must be published in the Federal Register; (2) the public must be provided with a 30-day comment period; (3) these regulations must be republished in the Federal Register; and (4) Congress must be given a 45-day period to review them before they go into effect.

Faced with questions concerning the legality of unpublished agency circulars and pronouncements containing mandatory language, the courts have generally concluded that the requirements are binding on state and local agencies with actual notice of them, in keeping with §552(a) of the Administrative Procedure Act (5 U.S.C. §501 et. seq.). See, e.g., Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1970); Hike v. Carter, 448 F. 2d 798, 803 (8th Cir. 1971); Kessler v. F.C.C., 326 F. 2d 673, 689-90 (D.C. Cir. 1963); Section 552 provides, in relevant part, "except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter to be published in the Federal Register and not so published."

[Footnote continues]

(footnote continued from previous page)

In two Supreme Court cases involving DHEW, Wheeler v. Barrera, 417 U.S. 402 (1974) and King v. Smith, 392 U.S. 309 (1968), the court has relied heavily on "requirements" contained in DHEW handbooks. In Wheeler, for example, the court authoritatively cited the handbook entitled Title I ESEA: Participation of Private School Children (DHEW Publication No. (OE) 72-62, which quotes or paraphrases Program Guide No. 24 (cancelled in 1972) in a determination concerning "comparable services" to educationally deprived children in private schools.

Moreover, Courts unwilling to accord guidelines unpublished in the Federal Register an equal status with officially promulgated regulations, nonetheless might find them to be binding on SEAs and LEAs through the practice and policy of judicial deference to agency administrative interpretations. Agency interpretations and guidelines are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945).

With respect to those guidelines containing directory language, the suggestions are considered acceptable courses of conduct which will satisfy a legal requirement and presumably have the legal effect of protecting a recipient against audit exceptions if the recommended course of conduct is followed. This latter proposition assumes that the statements contained in the guidelines are not inconsistent with the statute or regulations. Courts have explained that agency interpretations may be disregarded, particularly where they are at variance with its own regulations' clear language or the clear language of the statute. See e.g., Frances v. Davidson, 340 F. Supp. 351, 365-66 (D.C., Md.), aff'd., 409 U.S. 904 (1972); Stork v. U.S., 278 F. Supp. 869, 871 (D.C. Cal. 1967), aff'd. 430 F.2d 1104 (1967).

These program criteria were based on the law, and served to clarify and further explain the regulations. The program guides also provided basic information about Title I, including technical information about fiscal administration and evaluation, and suggestions for meeting the legal requirements regarding program development.

According to the Preamble to the September 28, 1976 revised regulations, the "criteria" set forth in the guidelines were superseded on October 28, 1976, the date the revised regulations became effective.[21]

In sum, the Title I statute contains the basic requirements governing the operation of Title I programs and projects. The regulations incorporate and explain in greater detail the essential elements of the law. The OE "criteria" in effect during our interviews were based on the law and clarified and further explained the regulations.[22]

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21 / The Preamble states, in relevant part, that "All preceding rules, regulations, guidelines and other published interpretations and orders issued in connection with or affecting Part 116 will be superseded when this regulation becomes effective" (41 FR 42894).

22/ Of course, a regulation and OE-developed criterion which is inconsistent with the legislative requirements would not be valid.

The first set of regulations implementing Title I (P.L. 89-10, the Elementary and Secondary Education Act of 1965), were published on September 15, 1965. Since then they have been amended on March 11, 1966, February 9, 1967, November 28, 1968, October 14, 1971, and June 28, 1973, to incorporate the provisions of P.L. 89-313, 89-750, 90-247 and 91-230. Proposed regulations implementing P.L. 93-380 appeared in the Federal Register on March 11, 1975 (40 FR 11472). Final regulations were issued on September 28, 1976 (41 FR 42894).

The first set of criteria, dated April 14, 1967, was issued as Program Guide No. 36. It was revised and reissued within a one-year period on March 18, 1968, as Program Guide No. 44. Today, this program guide is still used by SEAs and LEAs as one of the primary sources of OE policy.

D. The "Federal Informal Legal Framework"

1. Documents Constituting the "Informal Legal Framework"

Since 1965, the year Title I was enacted, an informal legal framework has supplemented the formal legal framework.

For purposes of this paper, the "informal legal framework"[23] in effect during our interviews included statements of policy issued by OE construing the statute and rules which it administers. OE interpretations concerning the informal legal framework are set forth in such documents as:

- OE handbooks,
- OE program support packages,
- OE guidelines and regulations which have been cancelled or superseded,
- OE program "Notices" and "Instructions" contained in the Program Directive System,
- internal OE memoranda, and correspondence between OE and particular states, construing the statute, regulations, and guidelines.

The informal legal framework also included oral statements made by OE officials at area workshops or in phone conversations (as described to the Project staff during interviews with SEA and LEA Title I personnel).

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[23] The term "informal legal framework" is synonymous with the legal term "interpretative rules". See Davis, Administrative Law Text (West 1972) at p. 126. In addition to performing the rulemaking function (an analysis of which is the focus of this paper), OE is required to monitor and enforce compliance with the rules (adjudicatory function). Periodically, OE sends review teams to each state to assess their competencies with respect to performance of specified administrative functions (for example application approval, monitoring and financial management). In addition, the HEW Audit Agency periodically audits the fiscal integrity of the grant transactions and compliance with the rules. The Title I adjudicative function generally includes (a) the refusal to approve annual plans submitted by states (these plans generally assure that they will faithfully administer Title I); (b) withholding of funds, and (c) recoupment of misspent funds alleged in the audits. Policy is communicated to interested parties in various ways, including for example, OE Review Team and HEW Audit Agency reports. This paper makes references to adjudicatory documents for the limited purpose of explaining the derivation or motivation behind a particular state policy. An analysis of the policy statements made as part of the adjudicatory function appears in a separate paper prepared by NIE.

2. The Distinctions Between the Formal and Informal Legal Framework

There are three basic differences between the formal and informal legal framework. First, unlike the regulations and guidelines, the policy pronouncements made through the informal legal framework are not always widely disseminated to all SEAs and LEAs. For example, a policy clarification made by OE in a letter to one SEA may be unknown to other SEAs. This is an important difference from the viewpoint of program administration.

OE and HEW generally do not disseminate memoranda. For example, OE Review Team Reports, which monitor the administration of Title I in individual states, are generally not forwarded to other states, although such reports are public information.

A second distinction between the formal and informal frameworks is that documents constituting the informal legal framework, especially the handbooks and program support packages, usually use simpler language than the provisions of the statute and regulations. Simplicity does not always increase clarity, but it often increases the frequency with which a document is used.

Although the statutory requirements and the officially promulgated regulations are legally binding obligations and the mandatory criteria set forth in certain program guides in effect during our interviews were binding on those LEAs having actual notice of them,[24] the legal status of the policy statements made within the informal legal framework in effect during our interviews is less clear. Generally speaking, these documents contained OE and HEWAA interpretations concerning the meaning of the statute, regulations, and guidelines. Unlike regulations published in the Federal Register, they did not have the "full force and effect of law." However, courts will defer to an agency's interpretation if (1) the interpretation is not contrary to the clear language of the statute or regulations;[25] (2) the agency has thoroughly considered the issues; (3) the agency's reasoning is valid; and (4) the interpretation is consistent with earlier and later pronouncements, and with the legislative history.[26]

The current legal status of the informal legal framework is even less certain. This uncertainty stems from two factors. First, as explained supra, the Preamble to the revised regulations states that "all preceding rules, regulations, guidelines, and other published interpretations and orders" affecting Title I were superseded the day the revised regulations became effective. Thus, for example, statements appearing in OE handbooks apparently are no longer in effect.

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[24] As explained supra, questions may be raised concerning the enforcibility of criteria found only in program guides; however, to the extent SEAs and LEAs have actual knowledge of them, we have assumed they are binding as legal requirements or contract terms.

[25] Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 1754n.11(1974).

[26] Skidmore v. Swift Co., 323 U.S. 134 (1944).

Second, under the Education Amendments of 1976 (P.L. 94-482) Section 431 of GEPA now requires, among other things, that all rules, regulations, guidelines, interpretations, orders, and requirements of general applicability issued by OE be published in the Federal Register as "proposed rules to take effect not less than thirty days after the date of publication." OE must then solicit comments to their proposals, republish the proposals in final form and then submit them to Congress. To date, none of the OE documents constituting the informal legal framework have been issued pursuant to these procedures mandated by the 1976 Amendments.

3. The Importance of Studying the Informal Legal Framework In Effect During Our Interviews

There are three basic reasons for considering the informal legal framework as part of our analysis of the administration of Title I. First, since those documents which were widely disseminated, e.g., handbooks and program support packages are phrased in non-legal, simplified language, they were and still are used and relied on extensively by SEA and LEA personnel as interpretations of legal requirements. For this reason it is important to analyze whether their statements are inconsistent with the statute and regulations. This analysis appears _infra_, at p. 57.

Second, it is important to analyze those documents which are not widely disseminated to determine whether the federal government's interpretations were consistent, well-reasoned and added clarity to the formal legal framework and, if published in the _Federal Register_, would substantially increase the understanding of the legal requirements. This analysis appears _infra_, at p. 63.

Third, certain documents which have been presented to individual states, e.g., OE Review Team Reports, HEWAA Reports, and OE correspondence, have often significantly influenced the policies, procedures and practices of certain SEAs. This discussion appears _infra_, at p. 85.

E. The "State Legal Framework"

1. Introduction

Under the existing federal legal framework, SEAs are responsible for overseeing the operation of Title I in school districts and private schools. The SEAs' responsibilities include, among other things, approving LEA applications and monitoring LEA Title I programs both to ensure that they meet legal requirements and to determine program quality. These responsibilities demand a keen understanding of the Title I requirements and an ability to apply these standards in assessing LEA practices. More than conceptual understanding of the requirements is required; SEAs must be able to advise an LEA whether a particular plan or practice is legal.

Unlike the federal government, many of the State Departments of Education included in the ten-state survey have no formal rulemaking mechanism, and therefore distinctions between formal and informal state legal frameworks are harder to draw and not particularly useful. Thus, for purposes of this paper, the "state legal framework" includes state policies set forth in officially promulgated regulations, guidelines, instructions for completing application forms, and SEA correspondence with the LEAs.

2. The Importance of Studying State Legal Frameworks

As explained supra, the state rather than the federal government is responsible for the day-to-day oversight of LEA Title I programs. It is the SEA which often interprets and applies federal policies. Thus, it is important to consider whether SEAs have developed policies which are consistent with federal policy and, to the extent practicable, discover the reasons for any inconsistencies. Important questions concerning SEA policies include the following: does the SEA offer examples of illegal practices and models of legal alternatives; does it restrict program design options by prohibiting practices which historically have been the subject of abuses; does the state create additional requirements, and do any additional requirements add flexibility or restrict program design options?

F. Overview of The Basic LEA Program Requirements Analyzed in This Paper

1. Introduction

In the following pages we provide a brief overview of the LEA program requirements. Following this narrative, we describe the basic LEA program requirements analyzed in this paper. These general descriptions of program requirements are listed alphabetically and are not intended to be precise or comprehensive definitions.27/

2. Overview of the LEA Program Requirements

Title I of the Elementary and Secondary Education Act (Title I) provides financial assistance to local educational

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27/ For a complete analysis of the meaning and scope of these requirements, see Part III.

agencies[28] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.

In enacting Title I, Congress made the following declaration of policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children. [Emphasis added.][29]

Under the Title I legislation, the United States Commissioner of Education (Commissioner) makes payments to State educational agencies[30] (SEAs) "on the basis of entitlements created under this title."[31]

To determine the amount of a state's entitlement the National Center for Education Statistics computes basic grants based on the number of children from low-income families residing in each county in the state.[32]

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[28] See *supra*, note 3 for the definition of the term "local educational agency".

[29] Section 101 of Title I (20 U.S.C. 241a).

[30] See *supra*, note 10 for the definition of the term "State educational agency".

[31] Section 102 of Title I (20 U.S.C. 241b).

Once an SEA is notified of its total allocation for each county, it distributes the funds to those school districts submitting applications approved by the SEA.

Each application submitted by an LEA to an SEA for approval must contain specific assurances or demonstrate that the LEA will comply with particular Title I requirements.

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[32] All states are entitled to receive funds, and state entitlements are based on the number of children from low-income families residing in the state according to the most recent census and A.F.D.C. statistics as determined by the Commissioner. The original Title I formula was 50% (the "federal percentage") of the average per pupil expenditure in the state multiplied by the number of children (aged 5 to 17) from low-income families. The 1966 Title I amendments increased payments to low expenditure states by allowing the state or national per pupil expenditure to be used, whichever was higher. Low-income families were defined as those families with incomes below the poverty level ($2,000 as of 1966, $3,000 as of 1968, $4,000 as of 1972), plus those families with incomes above the poverty level receiving A.F.D.C. payments. In fact, the $2,000 level was used because Congressional appropriations have never been large enough to fund at a higher level. Congress mandated the use of 1970 census statistics as of July 1, 1972 (P.L. 91-230).

The 1974 Amendments (P.L. 93-380) altered the formula significantly: the state's per pupil expenditure is now multiplied by 40% and the per pupil expenditure level for any state is limited to a range of between 80% and 120% of the national average. The low-income factor is determined by the "Orshansky index" which adjusts the poverty level according to family size and farm/non-farm location. Additionally only two-thirds of the children from families receiving A.F.D.C. payments are now counted. The effect of these changes is to provide more aid to states with a high proportion of families below the "Orshansky index" of poverty and to decrease payments to urban areas where A.F.D.C. payments often put families above the "Orshansky index."

In the words of the Title I statute, funds provided under Title I must be used to "expand and improve" the educational programs for educationally deprived children[33] and for "programs ... designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families."[34]

Each of the above words and phrases from the statute has a special significance which forms the basis for a requirement or series of requirements that LEAs must satisfy to receive grants under Title I.

In order to ensure that Title I programs best meet the needs of the intended beneficiaries, i.e., "educationally deprived children" residing in areas "having high concentrations of children from low-income families", the regulations and guidelines issued by OE contain eligibility and targeting requirements. The eligibility requirements[35] specify the schools within a district eligible to receive funds and the children in those schools eligible to participate in Title I programs. The targeting requirements establish criteria for selecting, from the list of eligible schools and children, those that will actually participate in Title I programs. [36] In most school districts insufficient funds are available to design comprehensive programs for all eligible areas and for all eligible children. Since Congress has never fully funded Title I, funds have generally been insufficient in this regard since the inception of the program. The eligibility and targeting requirements also ensure that LEAs do not discriminate against children qualifying for Title I services, simply because those children attend private schools.

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[33] Section 101 of Title I (20 U.S.C. 241a).

[34] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A) (emphasis added).

[35] Id.; 45 C.F.R. §116.17(d)(1975) and 45 C.F.R. §116.17 (a)(1975) now at 45 C.F.R. §116a.20(1976) and 45 C.F.R. §116a.21(c)(1976).

In order to ensure that Title I programs are "designed" [37] to meet the special educational needs of educationally deprived children in low-income areas, the regulations and guidelines require LEAs to demonstrate in their applications for Title I funds that (a) they have undertaken a comprehensive assessment of the special needs of the eligible children (needs assessment); [38] (b) they have described the objectives of the projects in relation to the special needs identified in the needs assessment (program objectives); [39] (c) they have designed their program in accordance with the objectives of the project (program design);[40] (d) they have concentrated funds on a limited number of programs and projects, thereby increasing the likelihood of success in meeting the objectives of the project (concentration);[41] (e) they will evaluate the projects to determine whether the objectives of the project have been met (evaluation);[42] (f) they have coordinated efforts with other agencies concerned with the same target population (coordination);[43] and (g) they have disseminated information concerning effective teaching strategies and techniques to Title I teachers (information dissemination).[44]

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[36] Program Guide No. 44, Section 4.6 and 45 C.F.R. §116.17(f)(1975), now at 45 C.F.R. §116a.20(c)(1976) and 45 C.F.R. §116a.21(e)(1976).

[37] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

[38] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.21(1976).

[39] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.22 (a)(1)(1976) and §116a.22(b)(1)(1976).

Other requirements are also intended to ensure that Title I funds are used to "expand and improve" the educational offerings of educationally deprived children and for programs which are designed to meet the "special" educational needs of educationally deprived children, so that Title I funds are not used merely to duplicate or replace services normally provided to children in the school district. To this end, the statute and the regulations contain (a) a provision prohibiting the distribution of state aid in any way which takes an LEA's Title I allocation into consideration and then penalizes the LEA in the distribution of state funds; [45] (b) a requirement that school districts maintain their fiscal effort (maintenance of effort); [46] (c) a provision requiring that Title I funds supplement the level of state and local funding and a restriction against using Title I funds to supplant, i.e., replace, state and local funds that would have been provided to program participants but for the existence of Title I (supplement, not supplant); [47] (d) a provision that Title I funds may not pay for services ordinarily provided in non-Title I areas with state and local funds (ordinarily provided); [48] (e) a requirement that services provided with state and local funds in Title I schools be comparable, that is, approximately equal, to services provided in non-

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[40] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.19(b) and §116a.22(1976).

[41] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)); 45 C.F.R. §116.18(a) and (e)(1975), now at 45 C.F.R. §116a.20(a and §116a.20(b)(1976). Concentration is closely related to the targeting requirements described above.

[42] Section 141(a)(6) and 141(a)(7) of Title I (20 U.S.C. 241e(a)(6) and (a)(7); 45 C.F.R. §116.22(1975), now at 45 C.F.R. §116.43(1976).

[43] 45 C.F.R. §116.24(1975); now at 45 C.F.R. §116.41(1976).

[44] Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10); 45 C.F.R. §116.25(a)(1975), now at 45 C.F.R. §116.44(a) (1976).

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[45] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44(1975), now at 45 C.F.R. §116.18(1976).

[46] Section 143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); 45 C.F.R. §116.45(1975), ~~now~~ at 45 C.F.R. §116.19(1976).

[47] Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B)); 45 C.F.R. §116.17(h)(1) and (2)(1975); now at 45 C.F.R. §116.40(1976).

[48] 45 C.F.R. §116.17(h)(3)(1975). Under the revised regulations, the "ordinarily provided" provision has been replaced by the "equitably provided" provision. 45 C.F.R. §116a.22(b)(10)(1976).

Title I schools (comparability);[49] and (f) a requirement that Title I funds be used only for the excess costs of programs and projects (excess costs).[50]

More specifically, the provision which prohibits penalizing reductions in state aid, along with other provisions, ensures that receipt of Title I funds is not used as a basis for discrimination.

The "maintenance of effort" requirement ensures that Title I grantees do not shift to the federal government their ongoing financial responsibilities for their education programs and helps ensure that federal assistance serves a supplemental rather than a basic education function.

The "supplement, not supplant" provisions prohibit LEAs from using the receipt of Title I funds by program participants as a basis for discriminating against children in the provision of state and local funds. In other words, program participants must receive the same level of state and local funds they would have received were Title I not in existence. They cannot be penalized in the provision of state and local funds because they receive assistance under

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[49] Section 141(a)(3)(C) (20 U.S.C. 241e(a)(3)(C)); 45 C.F.R. §116.26(1975), now at 45 C.F.R. §116a.26(1976).

[50] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)); Program Guide No. 44, Section 4.1, now at 45 C.F.R. §116.40(a)(2)(iii)(1976).

Title I. In no case may Title I funds be used to supplant state and local funds.

The "ordinarily provided" provision specified that Title I may not be used to pay for services ordinarily provided in non-Title I areas with state and local funds. As explained supra, this provision has been deleted from the revised regulations. In its place, the revised regulations include the "equitably provided" requirement. "Equitably provided" generally requires that an LEA provide state and local funds for services on an equitable basis without regard to the availability of-Title I funds.

The "comparability" requirement, is intended to ensure that services provided with state and local funds to educationally deprived children attending Title I schools are approximately equal to services provided to children attending non-Title I schools, before the addition of Title I funds for Title I schools.

The "excess costs" provision ensures that Title I funds will be used only for the excess costs of programs which exceed the average per pupil expenditures of an LEA for children included in such projects.

In addition, the legislation contains a requirement that programs contribute particularly to meeting the special educational needs of educationally deprived children, and the regulations contain a prohibition against the use of Title I funds to meet the general needs of the schools or the student body at large (general aid prohibition).[51]

Finally, the Title I legislation and the regulations issued by OE contain provisions designed to ensure that the above LEA program requirements are being followed. The most important of these requirements are (a) parent involvement,[52] (b) reporting to the SEA,[53] (c) recordkeeping,[54] and (d) access to information.[55]

3. LEA Program Requirements Analyzed by the Project

a. Access to Information -- Requirements intended to ensure that parents, the general public, the SEA and the Commissioner have access to relevant information concerning, among other things, project design, grant approval, and compliance with Title I.

b. Comparability -- Requirements intended to ensure that before the addition of Title I funds to the target population, the services provided to the target population are approximately equal to the services provided to non-target populations.

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[51] Section 101 of Title I (20 U.S.C. 241a); 45 C.F.R. §116.17(g)(1975), now at 45 C.F.R. §116a.22(b)(4)(iii), (b)(6), (b)(7) and (b)(8)(1976).

[52] Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14); 45 C.F.R. §116.17(o)(1975), now at 45 C.F.R. §116a.25(1976).

[53] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975), now at 45 C.F.R. §116.46(1976).

[54] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975).

[55] Section 141(a)(7) and (a)(8) of Title I (20 U.S.C. 241e(a)(7) and (a)(8); 45 C.F.R. §116.17(n)(1975), now at 45 C.F.R. §116.45(1976).

c. Concentration -- Requirements intended to ensure that Title I funds are provided to the target population in amounts needed to deliver services of sufficient size, scope and quality to give reasonable promise of success.

d. Coordination -- Requirements intended to prevent Title I from duplicating benefits provided to the target population by various federal and state agencies and programs.

e. Eligibility -- Requirements defining which school districts, schools and students are eligible to receive funds or participate in Title I programs. Eligibility criteria are of three types: those defining which school districts may receive assistance under Title I, (those which have maintained their fiscal effort) those defining the general characteristics of funded schools (those areas having high concentrations of children from low-income families) and those clarifying the class of potential recipients (children who are educationally deprived). Eligibility criteria are distinct from targeting standards since the latter determine which subset of eligible areas and recipients will in fact be served.

f. General Aid Prohibitions -- Requirements intended to ensure that Title I funds are used as categorical aid to meet the needs of educationally deprived children, and not used for the general needs of the schools or the student body at large.

g. Information Dissemination -- Requirements intended to ensure that results of educational research and reports on model programs are disseminated to teachers and administrators working on Title I programs.

h. Needs Assessment -- Requirements for empirical inquiry into educational deprivation and the incidence, severity, contributing factors, and relative priority of educationally deprived children's special educational needs.

i. Ordinarily Provided -- Requirements intended to ensure that Title I funds will not be used to provide services to children participating in Title I programs which are ordinarily provided with state and local funds to children in non-project area schools. (now replaced by the "equitably provided" requirement.)

j. Parental Involvement -- Requirements which prescribe the nature and extent of parental involvement in the development and operation of Title I programs.

k. Program Design -- Requirements for establishing the objectives and subobjectives of the Title I program and determining the activities and services which are necessary, sufficient, and best able to accomplish those ends.

l. Program Evaluation -- Requirements which provide that the effectiveness of the Title I program be assessed and analyzed and the results be used by the LEA in the design of future Title I programs.

m. Recordkeeping and Reporting -- Requirements pertaining to the maintenance of adequate records and the documentation and timely submission of documents on Title I programs including Title I applications and fiscal, evaluation, and comparability reports.

n. Supplanting -- Requirements intended to ensure that (a) school attendance areas and children participating in Title I programs are not penalized in the provision of state and local funds because they are receiving special assistance under Title I; (b) Title I funds are used only to pay for the excess costs of programs; and (c) Title I funds are not used to replace state and local funds that would be provided but for the existence of Title I.

o. Targeting -- Requirements which set forth criteria for selecting, from the list of eligible schools and children, those areas and children that will actually receive benefits under Title I.

PART II

GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF THE LEA PROGRAM REQUIREMENTS

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GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF LEA PROGRAM REQUIREMENTS

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PART II
GENERAL FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONCERNING THE BASIS FOR AND CLARITY AND RESTRICTIVENESS OF LEA PROGRAM REQUIREMENTS

I. Introduction

Part II of this paper offers the Project's general findings, conclusions, and recommendations concerning the basis for and clarity and restrictiveness of the program requirements applicable to local educational agencies (LEAs) applying for grants under Title I.

This part does not analyze in detail any particular requirement. Such an analysis appears *infra*. in Part III.

II. General Findings and Conclusions Concerning the Federal Legal Framework

A. Introduction

This section of the paper analyzes, first, the *basis for* the LEA program requirements set forth in the formal legal framework and, second, the *clarity* with which these requirements are stated in the formal and informal legal frameworks. Third, this section analyzes the degree of restrictiveness of the existing LEA program requirements.

B. The Basis for the LEA Program Requirements Set Forth in the Federal Formal Legal Framework

1. Introduction and Overview of Conclusions

As explained in Part I, *supra*, Title I is a categorical aid program providing financial assistance to local school districts for the purpose of expanding and improving the educational programs of educationally deprived children residing in school attendance areas having high concentrations of children from low-income families. Programs must be designed to meet the special educational needs of these children.

Each word or phrase has been given a special meaning by Congress and OE. Together, these words and phrases constitute the basic LEA program requirements of the Title I legal frameowrk. This section of the paper analyzes the significance of each requirement and the possible effects of deleting any one of them from the present Title I legal framework.

In general, we have concluded that the basic LEA program requirements (1) specify the class of intended beneficiaries --

educationally deprived children residing in low-income areas; (2) specify the nature of Title I programs -- they must be designed to meet the special educational needs of such children; and (3) attempt to maximize the likelihood that Title I funds will be used effectively to meet the needs of such children, by requiring that programs be properly planned and designed (program planning provisions) and that funds be allocated only for programs intended to provide additional services (funds allocation provisions).

We have also concluded, as is discussed below, that deletion of basic LEA program requirements could substantially change the focus and nature of the existing Title I legal framework and diminish the likelihood [56] that programs will accomplish the purposes of Title I.

These conclusions do not mean that the particular criteria chosen or phraseology used by Congress and OE are themselves necessary; however, the concepts imbedded in certain basic LEA program requirements are necessary to maximize the likelihood that Title I funds will accomplish the legislative purposes described above.

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[56] For purposes of this paper, it is presumed that a program that is well-planned is more likely to accomplish its stated goals than one that is not, and that a program simply cannot provide truly supplementary services unless the funds expended for that program are extra funds provided in addition to the full proper share of regular funds.

2. Program Focus

The child and school attendance area eligibility and targeting provisions of the present Title I legal framework expressly define the class of intended beneficiaries as educationally deprived children residing in low-income areas who are most in need of special assistance. If these provisions were deleted, the present mandatory focus on such children would be eliminated. However, the question remains whether the children Title I is intended to benefit would receive the same or comparable assistance if the level of funding continued, but the class were left undefined.

Based on interviews conducted in ten states and on a review of papers prepared by other researchers,[57] it is our conclusion that LEAs would, in all probability, decrease present funding levels for educationally deprived children residing in low-income areas if the mandatory focus on those children were eliminated. The reasons identified by those interviewed include local pressures to provide special programs and assistance in more affluent areas, local pressures to use federal funds to meet priorities other than compensatory education, the present fiscal crisis facing many jurisdictions, and the concomitant resistance of citizens to tax increases. As one SEA Title I Director explained,

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[57] See, for example, a working note prepared by Stephen M. Barro for the Rand Corporation entitled "Federal Education Goals and Policy Instruments: An Assessment of the 'Strings' Attached to Categorical Grants In Education" (February, 1977) and papers cited therein.

> Historically, the educationally deprived in poor areas do not have the political clout to require the provision of equal resources, and certainly not extra services. Title I ensures that these children will not be ignored. Most LEAs in my State, if left to their own devices would not use federal funds for compensatory education in poor areas; they would be used to counter the current fiscal crisis, whatever that crisis might be.

3. Nature of Program

The Title I legal framework presently requires that funds be used to meet the special educational needs of educationally deprived children residing in low-income areas. The present structure ensures that the focus of programs be educational although the legal framework clearly permits the use of Title I funds to pay for "auxiliary services," e.g., "health" or "welfare" services, to the extent such services are unavailable under other programs and support an educational objective. However, present requirements prevent Title I from being recast as a health or welfare program.

4. Program Planning Process and Parent Involvement

The Title I legal framework specifies the process LEAs must follow in planning a program: needs assessment, establishing program objectives, selecting proper strategies to accomplish objectives, concentration and coordination of resources, and providing for evaluation. These requirements attempt to maximize the likelihood that programs will accomplish their stated objectives. Each requirement responds to a separate concern. Similarly, the parent involvement provisions are included to maximize the likelihood that the program will be successful.

a. Needs Assessment -- Deletion of the needs assessment requirement could have a number of detrimental effects on the program planning process. First, absent a comprehensive assessment of children's needs, certain children residing in low-income areas who are in need of special assistance might be missed; whereas, parents of other children having less need for special assistance might successfully lobby for inclusion of their children in the Title I program. The needs assessment requirement enables LEAs to resist such pressures. Second, if it were not required to conduct a needs assessment, an LEA could use Title I funds to meet low-priority needs rather than the most pressing needs. Third, a needs assessment increases the likelihood that the educational strategies chosen will be effective. Knowledge of the specific needs of the children to be served is essential to the development of effective educational strategies addressing those needs. An extreme example of the consequences of failure to assess the needs of participating children was related by a Title I Director:

> An LEA decided to design a Title I reading program for grades K-3. It purchased books and hired a teacher without assessing the special needs of the program participants. It did not take long to see that the present design would not succeed because all of the children with reading problems were Mexican-Americans, who did not speak English, and the books were inappropriate for such children, and the teacher did not speak Spanish.

In sum, the needs assessment is used to identify program parricipants, areas of instruction and the nature of the educational problems that should be addressed. By way of contrast, other program development requirements -- identifying objectives, designing strategies to meet them, concentration of resources, and evaluation -- are intended to maximize the likelihood (1) that the problems that should be addressed are the problems that are in fact addressed, and (2) that they will be addressed successfully.

(b) Identification of Program Objectives -- Specific identification of program objectives establishes a clear direction for program activities. Thus, the formulation of objectives directly responsive to the needs identified in the needs assessment increases the likelihood that program activities will be relevant to identified needs of children. In addition, without objectives it is difficult, if not impossible, to determine whether a program has been successful since objectives establish the criteria against which success can be measured. It is also elementary that objectives encourage purposeful rather than aimless activity.

Elimination of the requirement of objectives would deprive program activities of clear focus and weaken the link between the needs assessment and program implementation.

c. Design of Strategies to Accomplish Objectives -- Similarly, the requirement that strategies be specifically formulated to accomplish program objectives is an important aspect of maximizing the relevance to pupil needs and the likelihood of success of Title I funded activities. This is nothing more than a requirement that (1) Title I programs be planned rather than determined merely by custom or inertia; and (2) that LEA staff use their best judgment to develop program strategies, e.g., regarding curriculum and resource development, that will accomplish previously identified objectives. Like the identification of objectives, this planning requirement provides a needed link between the needs assessment and the implementation of the program.

Advance planning of activities is designed to ensure balance and coordination among program components and to avoid the confusion and wasted energy that often accompanies inadequately planned activities. Most Title I programs require more than one staff member to implement. Advance planning can provide staff members with a clear picture of their roles in meeting objectives and prevent gaps and overlaps in the services provided.

d. Concentration and Coordination -- The concentration requirement which is intended to increase program quality, is based on a simple premise: if funds are spread so thinly that children receive few extra services or only brief exposure to the services provided, little or no progress will be made. Decisions to limit the number of participants to ensure program effectiveness -- so that the services provided are likely to substantially increase the educational attainment of the children served -- are difficult and sometimes painful to make. The concentration requirement serves this important purpose. If the requirement were eliminated, LEA officials might succumb to the pressures to "serve everyone" and implement numerous "pet projects." The coordination requirement is included in the Title I legal framework to avoid a duplication of benefits and to ensure the most effective and efficient use of Title I funds toward meeting the special educational needs of program participants.

e. Program Evaluation -- The evaluation requirement also plays an important role in maximizing program quality. Evaluations determine whether Title I projects are succeeding but, more importantly, they provide valuable insights about how programs might be improved. If the evaluation requirement were eliminated, mistakes could simply be repeated again and again, because no information justifying change would be available. Without an evaluation requirement the other provisions discussed above, intended to insure well planned, purposeful Title I programs, would be hollow indeed -- no check on the effectiveness of their implementation would be available. Thus, the evaluation requirement makes an important contribution to maximizing the likelihood that Title I programs will be successful.

f. Parent Involvement -- The parent involvement requirement is based on several premises. First, when parents are involved in the planning, implementation, and evaluation of a program for their children, there is a greater interest on the part of both parents and children in working toward the success of the program.[58] Second, there is a greater likelihood that Title I funds will be used for well-planned programs for the intended beneficiaries where the parents of the intended beneficiaries are authorized to perform oversight responsibilities with respect to the proper implementation of the program.[59]

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[58] This legislative premise described in the text is expressly set forth in the legislative history--House Report No. 93-80
3 U.S. Code Cong. and Adm. News 4109 (1974).

5. Funds Allocation Provisions

As explained supra, to ensure that Title I funds are used to expand and improve the educational programs of educationally deprived children and to meet the "special," as opposed to regular or ordinary needs of educationally deprived children residing in areas having high concentrations of low-income families, the legal framework prohibits discrimination (a) by the state in the level of state aid provided to school districts receiving relatively larger sums of Title I funds; (b) by the school district in the maintenance of its fiscal effort (maintenance of effort provision); (c) by the school district in the level of state and local resources provided to Title I designated project areas (supplement not supplant, ordinarily provided--equitably provided, comparability, and excess costs provisions); and (d) by the Title I school in providing state and local funds to children participating in the Title I programs (intra-school supplanting provision).

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[59] A recent report prepared by the Office of the Assistant Secretary for Education/Policy Development, DHEW, entitled, "The DHEW Sanction Study-Enforcement Policy in Title I, ESEA: Analysis and Recommendations" explains that there is a third basis for the parent involvement provisions. "Finally, parent involvement is seen, based on democratic principles, as a good in itself. If institutions develop in such a way that some groups are cut out of the system, or lack political skills to participate, the argument is made that means should be found for bringing them in."

Each provision is included to guard against a distinct type of discrimination in the provision of state and local funds. The deletion of any provision would allow an LEA to pursue a form of discrimination which would result in Title I funds being used for non-"special" purposes and contravene the basic legislative intent.[60] The following examples illustrate the function which each requirement performs.

Assume that in State A the state school aid formula reduces an LEA's state education aid by the amount of Title I funds received, i.e., a school district receiving twenty million dollars in Title I funds will receive twenty million dollars less state aid than it would otherwise have received. In this situation the school district is penalized by receiving less state aid than it would have received but for the existence of Title I. Title I funds, in this example, simply replace state funds resulting in no net increase in funds available to meet the special educational needs of educationally deprived children. The Title I legal framework includes a provision designed to prohibit this type of penalization.[61]

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[60] As explained supra, this conclusion should in no way be construed as saying that the particular criteria chosen or phraseology used by Congress and OE are necessary; rather we are stating that the concepts imbedded in the requirements are necessary to ensure that Title I funds are only used to meet the special educational needs of educationally deprived children.

[61] See supra, note 45.

Assume now that School District 1 reduces its local tax revenues by the amount of its Title I allocation, i.e., the LEA uses Title I funds to replace its local fiscal effort. The net effect is the same as in the example above, with Title I funds simply replacing local funds in Title I schools. The Title I maintenance of effort requirement is designed to ensure that federal assistance serves a supplemental rather than a basic education function, and that Title I grantees not shift to the federal government ongoing financial responsibility for basic education programs.[62]

Assume that School District 1, in response to pressure from parents residing in more affluent areas in the district (or because the district does not have an objective system for distributing state and local funds to schools within the district), provides a lower pupil to instructional staff ratio and greater expenditures per pupil for instructional salaries in schools not receiving assistance under Title I than in Title I schools. Assume, further, that the schools in the non-Title I areas provide kindergarten to the children of appropriate age paid for with state and local funds; whereas, the kindergarten age children in Title I areas receive the same instruction paid for with Title I funds.

The Title I comparability provisions are designed to ensure that Title I funds provide services in Title I areas that are over and above the level provided from local and

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[62] See supra, note 46.

and state funds in non-Title I areas. As Congressman Quie explained on the House floor (Volume 116, Part 8, 91st Congress, 2nd Session at P. 10013):

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children, this purpose is defeated.

Thus, the first type of discrimination described above is prohibited by the comparability provisions. 63/ The LEA must provide in each Title I area services comparable to those in non-Title I areas. Comparability is determined by specific ratios (pupil to instructional staff ratio and expenditures per pupil for instructional salaries).

However, in the example above, the comparability regulations do not prohibit School District 1 from discriminating against educationally deprived children in Title I schools in the provision of kindergarten; 64/

63/ See supra, note 49.

64/ Comparability is generally measured in terms of two ratios; (1) pupil to staff and (2) expenditures per pupil for instructional salaries. The existence of a kindergarten program which adds both pupils and teachers will not show up for purposes of computing comparability. For example, if school A has 8 instructional staff members and 200 children, without kindergarten, its pupil to staff ratio is 25 to 1. If 50 full-day kindergarten children and 2 kindergarten teachers are added to the school its pupil to staff ratio is still 25 to 1 (250 children ÷ 10 teachers).

However, this type of penalization was prohibited by the "ordinarily provided" provision and continues to be prohibited by the new "equitably provided" requirement. [65]

If, for example, there are ten (10) Title I schools and ten (10) non-Title I schools in the school district, each school has 50 children of kindergarten age and the LEA only has sufficient state and local funds to support a kindergarten program in ten of the twenty schools, the ordinarily provided provision is designed to ensure that the Title I eligible children will receive their fair share of state and local funds for kindergarten programs. In this district a proportional distribution of state and local funds would require that five (5) Title I schools receive state and local funds for kindergarten and five (5) non-Title I schools receive such support. [66] The LEA's Title I funds may then be used to provide kindergarten in the remaining five Title I schools. In this way Title I children, taken as a whole, receive supplementary kindergarten services.

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[65] See supra, note 48. The revised regulations which were published in the Federal Register on September 28, 1976 1976, replaced the "ordinarily provided" provision with a requirement for the "equitable provision" of state and locally funded services. (§116a.22(b)(10), 41 FR 42919). Even before the issuance of the revised regulations OE interpreted "ordinarily provided" consistently with the concept of the "equitably provided" requirement.

[66] If the schools had unequal enrollments, the proportional distribution would have to be determined by the number of kindergarten children in areas eligible and ineligible for Title I services.

Now assume that a Title I school decides to use Title I funds to provide children in the Title I program with their regular academic instruction for the entire school day. The Title I program is identical to the regular program. The class size for Title I children is identical to the class size for children not participating in the program. In sum, children in the Title I program receive no assistance from state and local sources for their education, in contrast to children not participating in the Title I program whose instruction is paid for from state and local funds, e.g., $1,000 per child.

The comparability and ordinarily provided requirements do not prohibit the type of penalization described above, i.e., discrimination which is occurring within the project area school; they only compare services in Title I areas with services in non-Title I areas. It is necessary to look to another requirement, that Title I funds supplement and not supplant state and local funds. The supplement, not supplant requirement,[67] which governs this situation, specifies that Title I funds must not replace the level of funds which would have been made available to children in Title I programs but for the existence of Title I, i.e., children in Title I programs must receive the level of state and local funds they would have received if Title I did not exist.

If Title I did not exist, the children in the Title I program would have received the same level of state and local funds as other children in the school. Thus, the use of Title I funds to provide the regular academic program described above is prohibited by the supplement, not supplant, provision.

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[67] See supra, note 47.

The excess costs provision added by Congress in 1974,[68] which provides that Title I funds may only be used to pay for the excess costs of programs, also governs the above situation. If the state and local expenditure in the district is $1,000.00 per pupil for the regular academic program, Title I may only pay for the costs of the program which are in excess of $1,000.00 per pupil.[69]

The supplement, not supplant and excess costs provisions are closely related. Supplement, not supplant prevents LEAs from discriminating against children in Title I programs in the apportionment of state and local funds, because of the existence of Title I. The excess cost provision reinforces the above standard by governing the level of state and local funds an LEA must commit to the education of children in a Title I program before Title I funds can be used to pay for supplementary components.

In sum, the provisions of Title I which (a) prohibit a state from penalizing an LEA because of the receipt of Title I funds;

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[68] P.L. 93-380. See supra, note 50.

[69] In other situations excess costs requirement is useful for determining the amounts which Title I can pay for particular services or other program components, i.e., the excess cost of a particular supplemental service.

(b) require LEAs to maintain prior fiscal effort; (c) require comparability among Title I and non-Title I schools; (d) require that an LEA equitably provide state and local services before using Title I to pay for additional amounts of that service; (e) require Title I funds to supplement and not supplant state and local funds; and (f) require Title I funds to pay for only the excess costs of programs and projects address distinct, but interrelated, forms of discrimination in the allocation of state and local funds to children in Title I programs and schools. Each provision is essential to prevent the form of discrimination it addresses, as described in the examples above. Each is designed to ensure that the "special educational needs of educationally deprived children" are served. If any of these provisions were deleted, Title I could be transformed into general school aid or property tax relief.

In addition to the anti-discrimination provisions described above, the Title I legal framework includes the general aid prohibition, a fundamental requirement designed to ensure the categorical nature of the Title I program. To delete the prohibition against using Title I funds for general aid purposes would have the effect of recasting Title I into a general school aid or property tax relief program and would, in all probability, reduce the total number of educationally deprived children receiving benefits under Title I. During our interviews in ten states, it was made clear to the Project by state and local education officials that there is tremendous pressure to use Title I funds for children who are not educationally deprived and to meet the needs of the school district as a whole. It was also explained that, if these pressures were not confined by the general aid prohibition, educationally deprived children could again be relegated to the low-priority status they occupied prior to the implementation of Title I.[70]

6. Accountability Provisions

The final category of requirements, which include the recordkeeping and access to information provisions, are designed to ensure fund and program accountability. These requirements provide a means for verifying compliance with other Title I legal requirements described above, including, for example, (1) the requirement that Title I funds only be used to meet the needs of educationally deprived children residing in low-income areas and not to meet the needs of children residing in eligible areas who are not educationally deprived or children who do not reside in low-income areas; and (2) the requirement that Title I funds be used to supplement, not supplant state and local funds.

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[70] This is not to say that withdrawal of the general aid prohibition would actually legalize the use of Title I funds for non-educationally deprived children; the child eligibility requirement would still prohibit such an abuse.

These accountability provisions enable the LEA, SEA, parents and HEW to determine whether the substantive requirements of Title I have been satisfied. To delete these accountability provisions would (1) foreclose attempts to document compliance or lack thereof, and (2) limit research which seeks to determine the reasons for the success or failure of Title I programs. Researchers would not be able to determine whether a program failed because of poor design or because Title I funds intended for Title I programs were diverted to other purposes or used to replace state and local funds.

C. The Clarity of the Language Set Forth In the Formal Legal Framework, Supplemented by the Informal Legal Framework

1. Introduction

Do those responsible for implementing Title I requirements know what they can and cannot do? We address this question here; to answer it properly we must first describe in greater detail the significance of the informal legal framework. The documents within the informal legal framework are of two types -- those widely disseminated and those not.

2. Widely Disseminated Documents Are Frequently Used, Although Their Value Is Limited [71]

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[71] It should be noted that the analysis of the widely disseminated documents set forth below is in no way exhaustive. Detailed analyses of specific points are included throughout Part III of the paper.

In the past eleven years, OE has published a number of handbooks and program support packages intended to clarify requirements set forth in the statute, regulations, and program guides.[72] The topics of these handbooks include selecting school attendance areas, parent involvement, writing performance objectives, preparing comparability reports, conducting on-site visits, and reviewing project applications. Program support packages have been written explaining virtually every LEA program requirement and SEA administrative function.

We have concluded, based on our interviews in ten states, that these widely disseminated documents: (a) are generally (but not always) consistent with the statute, regulations, and guidelines they were intended to clarify; (b) in several cases include substantive rules or suggestions for appropriate courses of conduct not otherwise appearing in the statute, regulations or guidelines; and (c) were helpful to SEA and LEA personnel and parents who used them primarily because of their general nature and simplicity of language.

We have also concluded that these documents, although widely used, are of limited utility because they: (a) rarely addressed difficult issues needing interpretation; (b) were not always precisely phrased; (c) were not always internally consistent; and (d) were often outdated. The discussion below illustrates these points.

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[72] In addition to dissemination of handbooks explaining various Title I requirements, OE has disseminated "exemplary" Title I program designs. Many of these "exemplary projects" appeared to be inconsistent with the basic Title I requirements. Several SEAs interviewed strongly criticized OE's failure to edit properly these "exemplary projects".

The handbook Title I ESEA: How It Works -- A Guide for Parents and Parent Advisory Councils (OE-73--7104) was generally well received in the states. In fact, one state Title I Director used this handbook as a manual for training his staff and local Title I coordinators, as well as parents. The handbook describes in simple language the basic LEA requirements, the functions which SEAs and OE must perform, as well as the duties and responsibilities of parent councils.

The handbook's intended purpose was to describe the basic Title I legal framework in general terms; it was not intended to be definitive. Consequently its use in lieu of the Title I statute or regulations is inappropriate.

Though for the most part general and descriptive (rather than specific and prescriptive), this handbook occasionally included substantive policies and suggested courses of conduct not expressly mentioned in the statute, regulations, or guidelines. For example, the handbook explained, on page 61, that an LEA using more than one data source to determine the number of children from low-income families in each attendance area must evaluate the importance and reliability of each data source and give it a weighting. Further, the handbook, at page 10, explains that "like any other formerly constituted group, the parent council must have an organizational structure." "Ideally, the council chairman should not be an employee of the LEA."

While these additions were often useful, ambiguities detracted from the handbook's usefulness. For example, in describing the needs assessment requirement, the handbook stated that, "identifying the educationally deprived children," is the first step of the needs assessment process and to perform this step an LEA should select a key indicator and "apply it to children at *all* ages and grade levels." However, on the next page, the handbook approved a flatly contradictory policy:

> In order to concentrate its Title I money on a limited number of eligible students, a school district must establish priorities for the use of Title I funds. Some states have set priorities for their school districts by limiting the use of Title I funds to elementary schools; this means the *needs* of students *in grades 7 to 12* are *not* even *considered* in the needs assessment.

A second handbook, entitled *Title I ESEA: Selecting Target Areas* (OE-72-138), has not been as well received as *How It Works* described above. However, selected portions of the manual have been used by the ten SEAs and disseminated to LEAs. The handbook explained in clear and precise language the technical rules of school attendance area eligibility in existence at the time of its issuance. However, subsequent to its publication, several significant changes in the regulations have been made in accordance with the 1974 Education Amendments; these are not reflected in the handbook.

In other respects the targeting handbook was even less satisfactory. The handbook contained inaccurate citations,[73] and occasionally used imprecise terminology to describe and define certain concepts. As a result, knowledgeable SEA Title I directors were forced to pick and choose among its assertions. Other Title I directors made no attempt to reconcile the inconsistencies.

The targeting handbook used the terms "selected attendance areas," "project areas" and "target areas" in a random, confusing fashion. "Target area" was defined as referring "collectively" to eligible attendance areas and project areas. In normal usage today, however, the phrases "target areas" and "project areas" denote areas actually served by Title I programs rather than all areas eligible for Title I.

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[73] The problem of including inaccurate citations is discussed *infra* in Part III, Chapter 2 .

In spite of its imprecise use of terms, the targeting handbook clearly spelled out which attendance areas may legally be designated areas in which Title I funds may be spent; the step-by-step process for making this selection of areas was unambiguously delineated.

What conclusions about the administration of Title I should be drawn from the defects of these documents which circulated within the informal legal framework? After making the observations about the problems of the handbooks, one writer concluded that "a state or local program manager seeking to determine the meaning of 'project area' will find himself confronted with imprecise terminology, fuzzy relationships and ambiguous delineations of responsibility within the Title I regulations and guidelines." [74]

Although finding the same problems of terminology in the handbooks, we found that the state documents reviewed by the Project indicate that the SEAs understand the proper procedure for selecting attendance areas for Title I programs, and have clearly so instructed their LEAs. Some SEAs also use inconsistent language, but no confusion exists about the attendance areas which Title I may serve. SEAs have clearly communicated the attendance area selection process to LEAs.

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[74] Milbrey Wallin McLaughlin, "Implementation of ESEA Title I: A Problem of Compliance" Teachers College Record February, 1976, Volume 77, No. 3, at p. 405.

Moreover, unlike the handbooks, the regulations are not "fuzzy," "imprecise," or "ambiguous" about the meaning of project areas. Our interviews with SEAs show that a complaint about inconsistent references, for example to "project areas," appears to have little or no significance in 1976 or 1977 for the administration of Title I. Still, the sheer irritation of inconsistent usage is sufficient justification for its elimination.

3. The Documents Which Were Not Widely Disseminated Often Provided Clear, Consistent, Reasonable, Non-Restrictive Interpretations of the LEA Program Requirements

On numerous occasions OE has, in correspondence with individual states, dealt with the difficult questions not included in widely disseminated documents. The Project analyzed the correspondence between OE and the states in our survey, as well as much additional OE correspondence. Based on this analysis, we have concluded OE has already interpreted in writing many of the most difficult and controversial issues, and these interpretations are generally clear, consistent, and reasonable when viewed as a whole.

Specific letters, read in isolation, were often difficult to understand. However, in every case, when a letter was read in conjunction with other OE letters on related points, an underlying policy emerged which was clear, consistent, and reasonable. Furthermore, we generally found that the letters gave SEAs and LEAs maximum flexibility within the statutory intent.

In short, we conclude that there exists at this time a body of interpretations which, if assembled, summarized, interrelated and published in the Federal Register would resolve most of the recurring questions about Title I raised by SEAs and LEAs.

For example, OE letters concerning supplanting explain the design of pull-out programs of various duration, the design of in-class programs, the issue of giving credit to a student for classes taught by Title I paid teachers, the classes a child can be pulled-out of,[75] the use of Title I funds for sick leave or plant operation and maintenance, and the circumstances under which the LEA may phase-in programs formerly funded under Title I. In addition, the OE letters consider such needs assessment and targeting issues as the use of standardized tests, the meaning of the term "greatest need," and the selection of kindergarten children.

In sum, any contention that OE does not have the capacity to interpret the law in a consistent, clear, and unambiguous manner while at the same time allowing flexible program design is, in our opinion, unfounded.

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[75] The term "pull-out" is defined supra, n. 16.

OE can be faulted, however, for not widely disseminating these interpretations and for not publishing them in the Federal Register. Where SEAs have sought clarification of legal requirements and operative definitions found in the regulations or guidelines, OE's responses have tended to be oracular rather than clear and comprehensive. As explained above, OE has consistently, and soundly, we believe, interpreted Title I provisions, but SEAs generally have not been given insight into OE's overall interpretation -- they have received only one slice at a time. Too often OE has kept its thoughtfully formulated answers to difficult issues hidden from view.

It should be noted that we are only commenting on OE's correspondence to agencies containing interpretations of policy. We are not claiming that OE has zealously enforced its interpretations. A conclusion on such a topic would be possible only after empirical inquiry not within the scope of our project.

4. The Language of the Federal Formal Legal Framework, Even When Supplemented by the Informal Legal Framework, Does Not Take Into Consideration the Needs of its Audience

a. Introduction -- We have concluded that the language of the standards and operative definitions for most LEA program requirements, as set forth in the existing formal legal framework, supplemented by the informal legal framework in existence during our interviews, does not take into consideration the needs of its audience. However, we found that the adequacy of the federal legal framework must be viewed from at least three perspectives: the perspective of the knowledgeable, experienced and committed person working in Title I administration; the perspective of persons involved in the administration of Title I who lack the time or inclination to study the law and develop comprehensive policies; and persons not involved in the administration of Title I.

b. The Knowledgeable, Experienced, Committed Person--First, the formal legal framework, supplemented by the informal legal framework has been sufficiently clear and precise for a person

- who, if she or he works at the state level, has received a mandate from the chief state school officer to administer the program in accordance with the spirit and letter of the law; or, if she or he works at the local level, is a Title I planner receiving the support of the superintendent, and
- who has been active in the administration of Title I for a number of years
- who is familiar with the informal legal framework, and has requested clarification from OE regarding interpretation of the law
- who has sufficient time to study and interpret the requirements and then develop comprehensive written policies.

We found several SEA Title I directors fitting the above description who had taken the time to develop models explaining difficult concepts. For example, one aspect of the so-called "supplanting" provision generally prohibits LEAs from discriminating against children served by Title I in the provision of state and local funds that would have been provided to them but for the existence of Title I. Several state models explain how to design legal, non-supplantive "in-class" and "pull-out" programs. Their explanations are consistent with OE regulations and guidelines and with OE interpretations contained in written correspondence with other states. For the most part, these state policies permit maximum flexibility of program design.

It is a credit to these SEAs and to the general consistency of the requirements of the formal legal framework that the SEAs were able to resolve successfully certain difficult issues without additional guidance from OE. Yet it is OE's role to resolve major conceptual difficulties. SEAs' primary roles should be ensuring that Title I programs are well-planned, of high quality, and are designed to meet the needs of the intended beneficiaries, i.e., educationally deprived children in low-income areas.

c. Persons Involved in the Administration of Title I Who Lack the Time or Inclination to Study the Law and Develop Comprehensive Policies -- The language of the formal and informal legal structure is likely to be unclear in certain respects to SEA Title I staff who lack the time or inclination to study the law and develop comprehensive policies.

A specific request by an SEA to OE for clarification of a requirement may do little since OE's individual responses have often been cryptic and assumed an understanding of OE's overall framework about which OE, itself, has generally been inscrutable. Consequently, an SEA which has not the time or inclination to develop a comprehensive Title I policy may not be able to comprehend the significance of an OE interpretation concerning a particular requirement.

For example, one Title I Director asked whether a high school student enrolled in a Title I funded remedial class could receive credit toward graduation for the class, since the teacher was paid solely from Title I funds (a supplanting issue).

In response to this question, OE explained:

> Another way of assuring the maintenance of the level of state and local funding for children in the Title I program is for the applicant to provide state and locally funded instructional resources directly to the Title I program on a basis that is commensurate with the number of children participating

> in that program. The latter approach must be followed if the Title I program provides the participating children with all of their instruction in a particular curriculum area whether or not they receive academic credit for such instruction.

Not being familiar with the relationship between excess costs and supplanting provisions, the SEA misinterpreted the letter and concluded that credit could be given when Title I paid for elective but not required courses. If this letter had been sent to one of the knowledgeable, experienced, and committed SEA Title I directors (described above) who had taken the time to develop a comprehensive policy concerning supplanting, the interpretation would have been different. Consistent with the non-supplanting models developed by these knowledgeable Title I directors, which explain the relationship between the non-supplanting and excess costs provisions, the SEA would have informed their LEAs, as one SEA actually did, that

> As presently implemented, the Title I math program is supplanting local and state effort since the eligible Title I children are receiving their math instruction from Mr. James and are receiving credit toward graduation and/or promotion for the Title I work completed.
>
> This is contrary, in our opinion, to the "over and above" philosophy of the Title I legislation, regulations and guidelines. This view is based on the fact that every student earns instructional time and support services from local and state fund sources which may not be omitted because a child qualifies for participation in the Title I project.

The Title I legal framework may also be viewed from the perspective of the SEA which uses the alleged ambiguity of Title I requirements as an excuse for failing to perform Title I administrative responsibilities. Those SEAs which take little initiative with respect to the administration of Title I are unlikely to provide much guidance to LEAs unless OE's requirements are frequently, widely, and clearly stated. Where OE's interpretations are perceived as opaque, the SEA may conclude that it is better to leave LEAs on their own; rather than issue an SEA interpretation and risk conflict with LEAs.

In sum, OE has assumed a level of understanding by SEAs which does not uniformly exist. We have concluded that for Title I to be administered uniformly throughout the states, OE must clarify the requirements of Title I, their interrelationships and applications in a comprehensive and understandable format and these clarifications must be set forth in the Federal Register. In this way, SEAs which have not taken the time to undertake a comprehensive analysis of the federal legal framework will neither feel insecure about issuing an interpretation, nor over-react to a perceived problem by adopting overly restrictive policies.

Certain SEAs contended that some auditors are inconsistent about what Title I requires and force LEAs to pursue restrictive educational policies. We did not study the HEW Audit Agency. However, since the audit agency is not a part of OE and undoubtedly has used inexperienced as well as experienced staff for Title I audits, it is likely that the same uncertainty about Title I requirements that has affected some SEAs has also had an effect on some HEWAA personnel.

d. Persons Not Involved with the Administration of Title I -- We did not study the perceptions of individuals who are outside of the administrative framework of Title I. Yet persons such as teachers, educational researchers, parents and others have important roles to play in Title I and an equal claim to an understandable and comprehensive written description of its requirements. If OE has left questions about its requirements in the minds of certain Title I administrators, OE has been even less helpful to others with an interest in Title I. As a consequence, some educational researchers have erroneously assumed that Title I prohibits certain activities, e.g., in-class instruction, and mandates a uniform rigid response to the needs of educationally deprived children.

e. Conclusions -- In short, we conclude that many of the perceived problems identified by LEAs, SEAs and educational researchers stemmed from (a) OE's failure to promulgate regulations which take into consideration the needs of the affected audience and (b) OE's failure to widely disseminate a precisely phrased informal legal framework including a body of interpretations which, if assembled, summarized, interrelated and published in the Federal Register would resolve the overwhelming majority of difficult questions raised by LEAs.

Furthermore, those SEAs which understand the various LEA program requirements have had to spend too much of their time decoding the meaning of the standards and operative definitions set forth in the formal legal framework and in explaining these requirements to the LEAs. The primary responsibility for making such interpretations rests by law with OE.[76] SEAs should be able to spend more time providing technical assistance as part of their application approval and monitoring responsibilities.

D. The Degree of Restrictiveness of the Federal Formal Legal Framework, Supplemented by the Informal Legal Framework

We have concluded that the language of the federal legal framework in effect during our interviews was generally not restrictive [77] with respect to the design and effective delivery of educational services to educationally deprived children residing in low-income areas. The requirements, consistent with the Congressional Declaration of policy referred to *supra*, ensur

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[76] See the discussion of the Education Amendments of 1976, supra, at p. 22.

- that the intended beneficiaries actually receive the benefits,
- that the program is well-planned and designed to best meet the needs of the intended beneficiaries, and not the needs of the school system, however pressing such needs may be,
- that the LEA does not discriminate against areas or children receiving benefits under Title I in the provision of state and local funds and services provided in non-project areas

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[77] In the course of our analysis, we did discover OE interpretations which could be construed as being overly restrictive. In several of these situations, we have included recommendations concerning appropriate changes. We also found that certain changes are appropriate with respect to the interrelationship between Title I and state compensatory education programs. Recommendations concerning state compensatory education programs are set forth in a separate paper entitled, *A Description and Analysis of the Relationship Between Title I and Selected State Compensatory Education Programs*.

We have also concluded that OE has, generally, interpreted Title I in a consistent and reasonable manner, allowing the maximum degree of flexibility permissible, without abandoning the principles described above. The Title I requirements are minimum process standards that do not restrict the design and implementation of innovative programs for educationally deprived children residing in low-income areas.[78] The flexibility of Title I can best be illustrated with specific examples of the types of policies and programs which Title I permits.[79]

- An LEA may design a program under Title I which provides special services to educationally deprived children while they are in their regular classroom or the LEA may decide to provide such special instruction in a separate location. This latter option is commonly referred to as a pull-out program. The LEA choosing the latter model may "pull" the child out for one period per day or for the entire day.

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[78] One SEA Title I director explained to us that, "Saying that Title I is restrictive is a code word for saying that Title I should be a general aid program."

[79] The following illustrations are derived from a review of the statute and regulations in effect during our interviews and were generally contained in OE interpretations included in correspondence with SEAs.

- It can design a program which is coordinated with the regular instruction or totally restructure the child's curriculum with respect to one area of instruction or with respect to the child's entire curriculum. [80]
- An LEA may purchase equipment, materials and supplies and even construct buildings with Title I funds under specified conditions. For example, requests for the purchase of equipment must be fully justified on the basis that the equipment has been selected and designated for specific purposes in connection with Title I project activities. The federal requirements do not, moreover prohibit the incidental -- the insignificant, insubstantial, and non-regular use of equipment purchased with

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[80] Part III, Chapter 9 entitled "The Supplement, Not Supplant Provisions" explains the funding source(s), i.e., state and local versus Title I which must be used depending on the design chosen.

Title I funds for non-Title I related purposes.[81]

- o An LEA may use its Title I funds in any grade levels it chooses. Title I is not restricted to the elementary grades.
- o An LEA may focus its Title I funds on the children who are furthest behind grade level at each eligible school, (e.g., all children functioning at or below the 25th percentile), or it can serve all educationally deprived children (e.g., all children functioning below the 50th percentile) at the schools having the highest incidences of children from low-income families, or it may implement any consistent policy midway between these two fully permissible extremes.
- o An LEA may serve educationally deprived children in all its schools where there is no wide variation in the incidence of poverty among the schools in the school district.
- o An LEA may use Title I funds to pay for support services such as psychological counseling or medical assistance, so long as the services address a

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[81] Because of wide-spread abuses in the early days with respect to the expenditure of Title I funds for these items, many states require comprehensive justifications before they will approve such expenditures.

need which is a factor contributing to the presence of educational deprivation or educational need, the needs assessment shows the actual need for the service other sources of funding for them are not available, the services are not ordinarily provided with state and local funds to children not participating in the Title I program, and only children in the Title I program take advantage of the services on a regular basis.

- An LEA may phase-in a new program such as kindergarten without having to first serve all Title I project areas, so long as the program is equitably distributed throughout the system, in such a way that project areas are not penalized or discriminated against.

Furthermore, we have concluded that while OE has generally interpreted Title I in a consistent and reasonable manner, it has not widely disseminated its interpretations or examples of their application to recurring situations by including these interpretations in the Federal Register. Although Title I permits great flexibility in the design of educational programs, OE has not provided SEAs with sufficient guidance about how to design a variety of programs within the Title I legal framework. Some SEAs have responded to this vacuum by developing their own flexible models for Title I programs. Other SEAs, because of their uncertainty or misconceptions about the meaning of certain requirements, have either promulgated overly restrictive policies concerning the kinds of programs Title I may fund or matched OE's lack of guidance with their own silence. This lack of clarity has not encouraged flexibility in program design; rather, it has discouraged the development of innovative programs. We have concluded that if OE had resolved and disseminated answers to persistent SEA questions concerning the legal framework, by including its interpretations in the Federal Register, many of the erroneous impressions that Title I requires programmatic rigidity would never have been formed.

In short, we have concluded that increased clarity in the formal legal framework, particularly in OE regulations, would result in greater LEA freedom to design flexible Title I programs. [82]

III. General Findings and Conclusions Concerning The State Legal Framework

A. Introduction

In the past, many SEAs did not take seriously their oversight responsibilities under Title I. They were not willing to interfere with LEA practices, LEA applications were given only cursory review, and little, if any, on-site monitoring took place.[83] This attitude was reinforced by SEA perceptions that OE was unwilling to exercise active oversight over them. Although the HEW Audit Agency was reporting widespread mis-expenditures of Title I funds, OE was viewed as being unwilling to act upon the allegations.[84] In this environment, the question of whether the requirements were clear and flexible was not of central importance because of a belief that it did not make any appreciable difference whether the requirements, whatever they were, were followed at all.

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[82] For a discussion of additional reasons why SEAs and LEAs may pursue inflexible policies, see our analysis of state legal frameworks appearing below.

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[83] *See*, e.g., Washington Research Project and NAACP Legal Defense and Educational Fund, *Title I of ESEA: Is It Helping Poor Children?* Washington, D.C.: Washington Research Report of the Southern Center for Studies in Public Policy and the NAACP Legal Defense and Education Fund, 1969 and *An Even Chance: A Report on Federal Funds for Indian Children in Public School Districts*. Washington, D.C.: NAACP Legal Defense and Educational Fund, 1971. *See also*, M. Wargo *et al*, *ESEA Title I: A Reanalysis and Synthesis of Evaluation Data from Fiscal Year 1965 through 1970*, American Institutes for Research in the Behavioral Sciences, (March 1972) at 5: "HEW audits of 40 states conducted between FY 66 and FY 69, for example, indicated that states have failed to adequately review LEA project applications, monitor and audit LEA activities, and insure proper financial control of Title I expenditures. More specifically, state audits of LEAs were of limited scope in 24 states and too infrequent in 11. Nine states failed to require adequate project justification from their LEAs and 32 used, or allowed their LEAs to use, improper accounting procedures and internal fiscal controls. Further, LEAs were permitted to use Title I funds as general school aid in 7 states; to supplant (replace) other federal, state, and local funds in 14 states; and to divert funds for purposes unrelated to Title I in 18 states. Twenty-one states failed to ensure that their LEAs concentrated their resources on the most academically needy children. Poor equipment management was also observed as a failure to obtain community and parent involvement in the planning, implementation and evaluation of projects."

Today, (and this may also be true for the last few years), the attitudes of many of the SEAs included in our survey concerning their responsibilities and their perception of OE's oversight role are different.

The review of the state written materials and the SEA comments made during our interviews indicates that a number of SEAs are today taking seriously their administrative duties under Title I and, consequently, are anxious for OE to clarify the requirements which they must administer.[85] Some of these changes are described below.

First, a willingness of SEAs to regulate LEA Title I practices is evidenced by the comprehensiveness of recently-developed state materials. For example, the legal non-supplantive models developed by several SEAs, discussed supra, were developed during the 1975-1976 school year. A comprehensive manual for parents was developed by one SEA in 1975. Many application forms now require comprehensive narratives describing the Title I programs and projects.

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[84] Id.

[85] Though we are confident of this point, the reader should be reminded that our findings are based primarily on a review of state written materials and on our interviews. We did not analyze whether and how effectively SEAs perform their administrative functions such as application approval, monitoring, fiscal management, technical assistance and enforcement.

Second, SEAs appear to be implementing suggestions of OE Review Teams and HEWAA Reports. In one state, we found a review team report for one year indicating that the state's Title I application did not request sufficient information respecting compliance with the school attendance area eligibility requirements. In the next year's application form, however, changes in response to the OE recommendations were evident. The same state had been told in a recent audit that the "SEA approved project proposals, contrary to established project approval criteria that did not clearly state education objectives or the type and extent of change expected." By the next year, though, this SEA had established procedures to ensure, "that all projects will be stated in performance terms with an appropriate evaluation scheme." In a second state where the 1968-1971 OE Review Team Reports had found a substantial number of problems, the Review Team Report in 1975 was highly complimentary. There is still room for improvement: one state included in our survey is still the subject of highly critical OE reviews.

Third, SEAs are questioning the quality and even the legality of some of the documents disseminated by OE. One SEA Title I Director explained to us that one of his most important administrative tasks is censoring OE disseminated materials prepared before 1972 which describe exemplary programs involving clearly illegal practices under present interpretations. He was concerned that these materials would confuse the LEAs and make his job that much more difficult

Finally, one SEA Title I Director described an incident which occurred at a regional meeting called by OE following the promulgation of proposed regulations in March of 1975. An SEA Title I Director asked the OE respresentative to clarify a particular phrase in the regulations. The OE representative winked and said the standard had intentionally been phrased in vague terms to preserve "maximum flexibility." At that point, almost the entire audience reacted; they wanted to know what was expected of LEAs so that SEAs could ensure that the expectations were realized. SEA representatives demanded clarity, not obfuscation.

Although we did not undertake an exhaustive study of the reasons for this change in attitude, the following are reasons provided to us by some of the Title I Directors we interviewed.

First, many of the SEAs and LEAs interviewed now believe that OE will actually attempt to recover misspent Title I monies. The existence and functioning of the HEW Audit Hearing Board has clearly affected the development of these beliefs.

Second, many SEAs believe that after 11 years of federal categorical aid a shift to federal general aid "with no strings attached" is not in the offing. Consequently, SEAs have a greater interest in influencing policy under the present legal framework.

"Watergate" also appears to have had an effect. One SEA attributed its recent change in policy from a laissez-faire approach to meaningful oversight to heightened awareness in state agencies of their responsibility to act in accordance with the law.

In sum, many SEAs included in our survey (a) appear willing to perform satisfactorily their administrative functions and (b) believe that OE will seek repayment when the HEW Audit Agency finds that Title I funds have been misspent.

In this context, the ability of the SEA to comprehend the meaning of the standards and operative definitions set forth in the formal legal framework, supplemented by the informal legal framework, takes on added significance.

Set forth below are our general conclusions concerning the overall quality and comprehensiveness of the Title I policies developed by the states included in our survey. Also analyzed are the reasons which might motivate a state to develop a comprehensive policy. In this regard, two types of state policies interpreting federal requirements are considered -- state policies which legitimately encourage maximum flexibility and state policies which unnecessarily restrict LEA program design options due either to misinterpretation of the federal legal framework or conscious policy choice.

Finally, we discuss comprehensive state Title I policies interpreting the federal requirements which are the least specific, namely, those governing needs assessment and program design.

B. Comprehensiveness and Quality of State Legal Frameworks

1. There Exists Considerable Variation Between States.

We found significant variation among states with respect to the scope and comprehensiveness of SEA interpretations of Title I.

Many states have developed comprehensive interpretations of one requirement, or an aspect of it, while leaving others unexplained. One state, for example, has developed comprehensive materials explaining the "intra-school supplanting aspect" of the general supplanting provisions and comprehensive policies respecting parent involvement, but none concerning the "ordinarily provided" concept,[86] targeting of children, needs assessment or concentration.

A second state has developed comprehensive materials with respect to targeting children, needs assessment and evaluation, but virtually no materials with respect to the other requirements.

The quality of state interpretations of Title I requirements also varies considerably. Some are sufficiently clear to guide LEAs in determining whether specific practices are legal. Others simply reiterate federal materials. Furthermore, we found a range of SEA approaches concerning the interpretation of particular requirements--from doing nothing, to reprinting or paraphrasing broad federal policies, to the development of state guidelines explaining how the broad policy would apply in certain factual circumstances, to the development of legal models.

In summary, no single conclusion can be stated concerning the comprehensiveness or quality of state Title I policies in general.

2. Possible Explanation Concerning The Development of Comprehensive State Policies

We found three factors motivating states to develop comprehensive interpretations of particular Title I requirements: (1) criticism of former state practices in reports by OE Review Teams or the HEWAA; (2) LEA demands for clarification concerning a specific issue; (3) SEA desire to promote its educational philosophy.

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[86] These provisions are discussed *infra*, in Part III.

We found that the first two reasons were the primary factors motivating the development of policies concerning targeting of children, supplanting, general aid, and comparability. Some states, e.g., those which developed a comprehensive policy concerning the supplement, not supplant provision without much prodding, are exceptions to this pattern. The third rationale generally motivated the development of policies with respect to such requirements as needs assessment, program design, and evaluation.

The reason for this is apparent. SEAs feel more comfortable issuing and then monitoring compliance with requirements which are traditionally thought to be within the realm of educators' expertise. SEAs appear less likely to take the initiative with respect to requirements that protect the categorical nature of Title I programs. As explained _supra_, however, more SEAs are now willing to exercise leadership with respect to the latter requirements, so long as they receive sufficient support from OE. It is important that this support, as well as advice, be forthcoming.

We found that the SEAs which have developed comprehensive written policies spent an inordinate amount of time doing so. This is because, in the absence of adequate OE guidance, they had to "discover" the meaning and scope of each standard and operative definition. The time required is a major deterrent to the development of comprehensive policies by other SEAs. Moreover, this time could be better spent providing technical assistance to help LEAs improve the quality of their programs.

In our recommendations concerning specific Title I requirements, we have recommended that SEAs assume specific technical assistance responsibilities. These responsibilities will be difficult for SEAs to perform satisfactorily if they must spend great amounts of time determining how to apply specific legal standards to particular fact situations. The same fact situations arise in LEAs throughout the country. OE must assume the responsibility for clarifying federal requirements and explaining how they apply to the full range of educational programs and services for which LEAs may use Title I funds.

a. Comprehensive State Policies Which Clarify But Do Not Restrict the Design of Programs--Several states have developed comprehensive policies which clarify the range of acceptable LEA policies without pursuing unnecessarily restrictive policies. For example, in one state the Title I application includes several legal, non-supplantive program design models which LEAs may pursue, including in-class and pull-out designs. A second state clearly describes the various options available to LEAs concerning the determination of which school attendance areas are eligible to receive Title I funds.

A third state includes in its policy statements examples of specific practices which are legal and those which are unacceptable.

Probably the two least specific LEA program requirements are the needs assessment and program design requirements. Several SEAs have filled this void with comprehensive policies describing the process and range of acceptable alternatives.

b. State Policies Which Limit Local Options--In addition to nonrestrictive policies, such as those in the above illustrations, we found state policies which limit local discretion. These policies are directed toward either (a) objectively defining federal requirements, (b) guarding against audit exceptions,or (c) promoting the educational philosophy of the SEA.

The first category of state policies concern federal requirements which allow states significant discretionary authority. One example is the concentration requirement which states that programs must be of "sufficient size, scope, and quality" to assure reasonable promise of success. To implement this requirement, one state requires LEAs to spend a minimum of $234 in Title I funds per child served in a Title I program. In a second state the permissible range is $350 to $550.

The second category of state policies, which are intended to guard against possible audit exceptions, are pursued either by choice or because of insufficient understanding of the federal requirements.

For example, one SEA will only approve pull-out programs under Title I. Another state prohibits program design components which, based on past experience, have been prone to abuse. Thus, this SEA flatly prohibits the use of Title I funds to pay for any service which an earlier HEW audit challenged as a general aid violation--art, music, gym, home economics, band, guidance counselors, and nurses. The auditors had objected only to the participation of non-Title I children in these programs, not to the provision of such services to meet the identified needs of Title I children. The state over-reacted, however, due to lack of understanding of the audit findings, and fear of being "burned" again in the future.

The third category of state policies are designed to implement the educational philosophy of the SEAs; some states use the Title I requirements as means of furthering a state goal. Examples of such state requirements supplementing the federal requirements include requirements that Title I funds be focused on a particular grade span (i.e., K-6, 7-9, 10-12), individualized instruction requirements, and minimum qualifications for all Title I paid staff.

It is our conclusion that SEAs should be allowed maximum discretion to develop policies which objectively define federal requirements and which further state policies within the basic framework of the Title I provisions.

To this end, OE should clarify by regulation the full range of legal program design options, including the circumstances under which specific components may be incorporated, so that SEA policies reflect educational choices, not generalized fear of audit exceptions.

IV. Recommendations

Consistent with our general findings and conclusions set forth above, we recommend that no fundamental changes be made in the existing Title I statute with respect to the LEA program requirements. The specific statutory and regulatory changes which we do recommend are described in Part III.[37]

We do, however, make three major recommendations concerning the United States Office of Education's administration of Title I. First, we recommend that OE include, under each substantive requirement set forth in regulations published in the Federal Register, illustrative examples of its application to commonly occuring situations. This technique is commonly used by other agencies for clarifying complex requirements.[38]

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[37] Specific recommendations concerning the administrative functions SEAs must perform are set forth in a separate paper prepared by the Project entitled "An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965". Specific recommendations concerning the relationship between Title I and selected state compensatory education programs are set forth in a third paper prepared by the Project entitled, "A Description and Analysis of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs".

[38] See, for example, regulations published by the Internal Revenue Service in Title 26 of the Code of Federal Regulations.

Second, a separate section entitled "interpretations," should be included in the regulations.[89] This section should be organized by subject area, rather than by requirement. Suggested headings include: teacher aides, support services, pull-out programs, in-class programs, desegregation, individualized instruction, inservice training, programs in open space schools, etc. The resolution of the problems arising in these areas often involves interpretation of a number of regulations. This section of the regulations should also include legal models illustrating the wide range of alternative program designs which are possible.

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[89] As explained *supra*, in accordance with the Education Amendments of 1976, Section 431 of the General Education Provisions Act now requires, among other things, that all "interpretations" be published in the *Federal Register*. In addition, Section 431 of the GEPA Statute presently requires that OE treat "interpretations" in the same manner as it treats substantive regulations with respect to publication in the *Federal Register* of a notice of proposed rulemaking, comment period, republication and submission to Congress. We recommend that Section 431 of GEPA be amended to require that OE "interpretations" simply be published in the *Federal Register*. OE should not be required to first publish their interpretations in proposed form subject to comments, republication and submission to Congress since, interpretations, unlike legislative rules, do not have the "full force and effect of law." Recall that a substantive rule implements the statute; whereas interpretations simply advise the public of the agency's construction of the statutes and rules which it administers. Moreover, application of burdensome procedures to interpretations discourages rather than encourages interpretation by OE when issues need clarification. Our recommendation that OE be required simply to publish its "interpretations" in the *Federal Register* and not follow the procedure applicable to other legislative rules is not exceptional in any sense of the word. OE "interpretations" would then be subject to the *same* procedures most other Federal agencies now follow under sections 552 and 553 of the Administrative Procedures Act (5 U.S.C. 552, 553).

It should be noted that we do not recommend that the language of the existing regulations be totally discarded and less legally-based language substituted.

The language of many of the regulations has been in existence for approximately eight years. Over time, most agencies have become familiar with these terms, although they may not always understand their precise implications or application. It is our opinion that less dissonance and more clarity would result from explaining the operative definitions, concepts, and standards set forth in present regulations than from totally revising the phraseology. Of course overly complex sentences in present regulations should be simplified. On several occasions such recommendations are made in our paper. We submit, however, that a complete revision would not be productive and would likely result in greater confusion than clarification.

Finally, we recommend that Congress require OE to prepare a policy manual for use by OE staff, HEWAA staff, SEAs, LEAs, and parents. The precedent for the development of a policy manual is firmly established in other agencies.[90]

The manual [91] should include, at a minimum (1) quotations of relevant sections of the Title I and GEPA statutes, (2) quotations of relevant regulations appearing in the Code of Federal Regulations, (3) explanations of the purpose of each requirement, with references to the legislative history, where relevant, (4) summaries of OE responses to SEA requests for interpretations, including examples of actual applications of the standards and operative definitions set forth in the regulations, (5) summaries of final decisions rendered by the HEW Audit Hearing Board, (6) final determinations made by OE concerning audits closed without reaching the Hearing Board, and (7) summaries of relevant court decrees.

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[90] For example, the Department of Housing and Urban Development has developed a manual explaining its Section 8 Housing Assistance program. Similarly, the Department of Labor developed a manual for administering the now repealed Welfare and Pension Plans Disclosure Act.

[91] It is our opinion that a mandate that OE prepare a manual would not be inconsistent with section 431 of GEPA, relating to publication in the Federal Register, (see supra.) so long as the following components of the proposed manual first appear in the Federal Register pursuant to the procedures of Section 431: (1) quotations of relevant regulations, (2) summaries of OE interpretations, and (3) examples of actual applications of the requirements in the regulations. The remaining components of the proposed manual, since they are not "rules, regulations, guidelines, interpretations, orders, or requirements of general applicability," need not be published in the Federal Register. Of course, Congress could also exempt specific components of a manual from the requirements of Section 431. We do, however, recommend that consistent with the Freedom of Information Act that OE publish in the Federal Register a notice that such a manual exists. (See 5 U.S.C. 552).

The manual should be organized by requirement and by subject or topic areas, including, for example: "teacher aides," "support services," "pull-out programs," "in-class programs," "desegregation," "individualized instruction," "in-service training," "programs in open-space schools," etc. 92 /

The manual should also explain the full range of alternative program design models which LEAs may pursue and, more important, describe the kinds of records they must maintain to leave a sufficient "audit trail" which HEWAA might follow. This latter section should be prepared jointly by OE and the HEWAA.

The suggestion that a manual be developed is based on the premise, described *supra*, that the Title I requirements are minimum process standards which do not restrict innovative programs which are (1) of sufficient size, scope, and quality

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92 / OE should consider using the Table of Contents of Part III as an outline for the proposed policy manual.

to ensure a reasonable promise of success, and (2) are designed to best meet the special educational needs of educationally deprived children. Several state manuals contain unnecessarily restrictive policies which limit LEA flexibility and go beyond the requirements of the federal legal framework.

An OE manual explaining the full range of permissible program design options would help to eliminate the constraints on local discretion which result from uncertainty about Title I requirements, rather than educational choice, and would greatly facilitate compliance with the mandate set forth in Section 431 of GEPA that all regulations be uniformly applied and enforced throughout the country.

The OE correspondence we reviewed directly suggests the feasibility of developing a manual that includes interpretations that facilitate innovation and creativity rather than discourage it.

PART III

ANALYSIS OF THE MAJOR REQUIREMENTS APPLICABLE TO LOCAL SCHOOL DISTRICTS APPLYING FOR GRANTS UNDER TITLE I

PART III: ANALYSIS OF THE MAJOR PROGRAM REQUIREMENTS APPLICABLE TO LOCAL SCHOOL DISTRICTS APPLYING FOR GRANTS UNDER TITLE I

INTRODUCTION TO PART III

Part I of this paper sets forth the general purposes of this paper and the basic definitions used throughout the paper. Part II of this paper includes our general conclusions and recommendations concerning the necessity, clarity and restrictiveness of the overall federal legal framework.

Part III of this paper includes an in depth analysis of the necessity, clarity, and restrictiveness of each major program requirement applicable to local school districts applying for grants under Title I. This Part includes 14 chapters, each focusing on a particular LEA program requirement. Each chapter contains a description of the relevant sections of the existing federal legal framework, the legal frameworks developed by the states included in our survey, and the project's analysis concerning the efficacy of the existing federal legal framework, i.e., what additions, deletions, or clarifications are needed in order to improve program administration.

The major LEA program requirements analyzed in this paper were generally described supra. in Part I. The detailed analysis of these requirements will be presented in Part III in the following sequence:

- School District Eligibility
- School Attendance Area Eligibility and Targeting
- Program Development
- Needs Assessment
- Eligibility and Targeting of Children
- Program Design
- Concentration
- Evaluation
- Supplement, Not Supplant and Excess Costs
- Comparability
- Ordinarily Provided
- General Aid
- Parent Involvement
- Coordination

CHAPTER 1

SCHOOL DISTRICT ELIGIBILITY PROVISIONS AND RESTRICTIONS CONCERNING THE DISTRIBUTION OF STATE AID

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CHAPTER 1
SCHOOL DISTRICT ELIGIBILITY PROVISIONS AND RESTRICTIONS CONCERNING THE DISTRIBUTION OF STATE AID

I. Introduction

A. Overview of the Federal Legal Framework

Under the federal Title I legal framework, not all school districts in a state are eligible to apply for and receive payments under Title I. There are threebasic conditions which all school districts must comply with in order to receive Title I funds. First, the LEA must comply with the so-called "maintenance of fiscal effort" requirement which generally provides that the LEA may not decrease its total non-Federal spending. As the result of the Education Amendments of 1976, this requirement has been substantially revamped and embellished;[93/] "maintenance of fiscal effort" now is satisfied where the LEA reduction in amount expended per student or aggregate amount expended for the preceding fiscal year does not exceed five percent of that amount for the second proceeding fiscal year. The "maintenance of fiscal effort" requirement is nevertheless subject to two types of waiver by the Office of Education.

Second, there must be at least ten children from low-income families between the ages of 5 and 17. Third, the Title I program must involve an expenditure of not less than $2,500. This figure may be reached by joining into a cooperative program with other LEAs. However, if the SEA determines

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[93/] For further details concerning the history, scope and effects of these amendments see Section II, *infra*.

that it is impossible for the LEA to join with another LEA for reasons such as distance or travel, the SEA may reduce the $2,500 floor.

In addition, the State in which the LEA is located must not take into consideration payments under Title I in determining (a) the eligibility of the LEA for state aid, or (b) the amount of state aid for the present year or for the preceding fiscal year.

B. Organization of This Chapter

This chapter of the paper will analyze three related requirements concerning school district eligibility. The first requirement analyzed is the maintenance of effort provision. This analysis focuses primarily on the areas of confusion resulting from OE's interpretation of the so-called "unusual event" proviso and the recent statutory resolutions of this question. Second, we will analyze the minimum monetary and numerical standards for determining school district eligibility. Finally, we will analyze the restrictions concerning the modification of the states' aid formula to penalize districts receiving large sums of Title I funds.

C. Overview of Major Issues, Conclusions, and Recommendations

The Legal Standards Project has surveyed the general issues involved in school district eligibility requirements; they are more specifically set forth in the main body of this section.

The major confusion and controversy with respect to school district eligibility has concerned the meaning and scope of the "maintenance of effort" provision and the respective roles of the SEAs and the OE in implementing this requirement. More specifically, SEA and LEA questions in the recent past have focused on the standards and data used for computation purposes, the extent of excused compliance from the "maintenance of fiscal effort" requirement pursuant to the "unusual event" proviso, and the relative responsibilities of the SEA and the OE. However, due to recent congressional action dealing with just this aspect of the Title I program, few recommendations for change are warranted. Instead, we have felt it more appropriate to examine, discuss, and clarify the issues and legislative resolutions which have arisen in the area.

Despite Congressional resolution of the main controversies involved in maintenance of fiscal effort OE's role remains crucial. For example, it remains OE's responsibility to establish "objective criteria of general applicability" in administering the two waiver provisions dictated by Congress. While legislative history indicates certain situations encompassed by the two provisions, any further definitional statements as well as the individual LEA determinations are the responsibility of OE. We recommend that OE promulgate specific objective standards, including a number of examples, for purposes of establishing the metes and bounds of the waiver provisions. In addition, in one major area which remained unaddressed by Congress, we recommend that LEAs be permitted to use the best available estimated data for computation purposes when they submit their maintenance of effort figures in the early spring, due to the unavailability of actual figures at that time. However, because of the fundamental importance of the requirement, we also recommend that actual data be submitted by a date certain.

II. "Maintenance of Effort" Requirement

A. Introduction

The maintenance of effort requirement is generally designed to ensure that Title I grantees do not shift to the federal government what Congress has considered to be their ongoing financial responsibility to their education program, and, further to help ensure that federal assistance serve a supplemental rather than a basic education function.[94] In other words, the maintenance of effort provisions are designed to "prevent the erosion of state and local support which might otherwise occur with the availability of increased federal funds."[95]

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[94] Cong. Record, Senate April 7, 1965 at p. 7043.

[95] Letter from OE to a state Superintendent of Education dated October 3, 1969. Maintenance of effort provision exists in many federal education laws.

This section of the paper will analyze certain key issues regarding the meaning and application of the maintenance of effort requirements including a discussion of (a) the standards for computing maintenance of effort, (b) the scope of the "unusual event" exception to the requirement, and (c) the division of responsibility between the SEAs and OE regarding the exception. In the course of analyzing these issues, changes made by the Education Amendments of 1976 as well as additional recommendations made by the Legal Standards Project will be described.

B. Maintenance of Fiscal Effort

1. Estimated Versus Actual Data

Prior to the passage of the Education Amendment of 1976, the Title I statute and regulations provided that the combined fiscal effort of an LEA and the State with respect to the provision of free public education "for the preceding fiscal year [must not be] less than such combined fiscal effort for that purpose for the second preceding fiscal year." (Section 143(c) (2) of Title I; 45 C.F.R. §116.45(a) (1974)). However, neither the statute nor the regulations included standards regarding the nature of the data sources which an LEA or SEA could properly use for computing an LEA's combined fiscal effort. As a result, OE has issued unofficial policy statements explaining the maintenance of fiscal effort. Set forth below is a description of these federal interpretations and various state interpretations.

In response to inquiries by one state included in our survey as to data sources and availability, OE explained that "it is incumbent on every local educational agency to make the best possible estimate of its current expenditures ... " "... the LEA should be able to show the relationship between actual expenditures and approved budgets for past years and should present such information to your office. Your office will also be able to check on estimated total expenditure when final expenditures are submitted the following year."

Further elaboration concerning the use and relationship between actual and estimated data were formulated by the SEAs themselves. One SEA explains that "the second preceding fiscal year means the latest year for which you have actual data available. Provide the best estimate for the preceding fiscal year using whatever data is available." In another state, the application instructions permit LEA use of estimated data, provided it is so indicated. And in a third state the SEA requires that current expenditures may not be less than 5% of either of the last two years without approval from the SEA.

2. Locus of Responsibility for Computing Maintenance of Fiscal Effort

A related issue concerns the locus of responsibility for making the maintenance of fiscal effort computation. The existing regulations provide that the SEA must "find" that the LEA has complied with the relevant requirements. Presently, the SEAs in three states interpret this proviso as requiring that the SEA make the computations. Commencing with FY 1977, two of these states and the remaining states will require that the LEA undertake the calculations.

In one state surveyed, the SEA explained that its Division of Research, Evaluation, and Information Systems annually prepares OE Form 2303 entitled: "Certification of Current Expenditures made by Local Educational Agencies for Free Public Elementary and Secondary Education." Using the per pupil expenditure figures determined for purposes of the above report, the SEA is able to determine compliance with the maintenance of effort requirements.

In another state, the SEA requires that the LEA compute the statistics. When we asked whether the SEA monitors the LEA computations it explained that there is no need to monitor such figures because "the LEA has no reason to falsify the data."

3. Small District Computations

In addition to the problems identified above, several states identified the problems faced by small rural districts in computing maintenance of effort data. By way of illustration, one state has explained that in very small LEAs, one family moving into such an LEA could effect the eligibility of that LEA to receive Title I funds because of lack of maintenance of effort. The following example was provided:

Example:	1973 FY	Theoretical
School District "X"	20 Students	$700 (Title I Allocation)
Local Funds	$20,000	
State Funds	20 x $386 = $7,720	(State Guarantee per child)
Total State & Local		$27,720 + 20 Students = Per Pupil Expenditure $1,386
	1974 FY	
School District "X"	24 Students	(20% Student Increase)
Local Funds	$20,000	
State Funds	24 x $394 = $9,456	(State Guarantee $394 per child)
		$29,456 ÷ 24 Students = Per Pupil Expenditure $1,227

"The above example is a very simplified presentation to illustrate the effect of student increase, causing a reduction in per pupil expenditure. The $20,000, which represents the local funds available, is fixed by law on the land and property value in an LEA. Every time a few more students move in and enroll in school, a LEA cannot increase its local funds to meet the demands of not less than a 5% reduction, as mandated in Title I."

4. Policy Analyses, Recent Statutory Changes And Recommendations

Since most states require that LEA Title I applications be submitted by June or July, it may be impossible for actual data to be included for the "preceding year." Thus, we recommend that OE expressly recognize the unofficial policy of using the "best available estimates" for the preceding year" computation. We also recommend that the regulations include a provision explaining the actual data be used for the "second preceding year" computation. Finally, we recommend that where estimated data is used, the SEA or the LEAs be required to recompute maintenance of fiscal effort during the current year by a date certain, employing actual data for the "preceding year" computation.

The rationale for the second and third recommendations concerning the use of actual rather than estimated data is that the requirement is too fundamental and basic to the Title legal structure to rely on estimates. As stated supra., the maintenance of effort provisions are designed to prevent the erosion of state and local support which might otherwise occur with the availability of increased federal funds. To the extent an LEA fails to comply with this requirement, the expenditure of Title I funds will not be used to supplement the expenditure of state and local funds. Rather, Title I will be used to replace state and local funds.

The recomputation requirement should not be an added burden since LEAs must calculate actual expenditures for budgetary purposes and pursuant to state aid requirements. In addition, it is not a question of whether the LEA must compute actual data but when, since for the next school year the "preceding year" will become the "second preceding" year for which actual data is presently required.

In terms of computation responsibility, we recommend that the existing legal structure allowing either the LEA or the SEA to compute maintenance of effort be maintained, since the locus of responsibility is not important so long as the SEA maintains the responsibility for making a "finding" of compliance.

Finally, the problems involved in small district computations have been resolved through the Education Amendments of 1976. Under the amendments, the "fiscal efforts" which are examined for percentage requirements may now be measured either in an amount per student or aggregate expenditures 96/, thus enabling a sufficient degree of LEA flexibility to accommodate the problems of small district population changes.

C. The "Unusual Event" Proviso

1. Introduction

Under the current regulations (45 C.F.R. §116.45(b)(1974)), an LEA's combined

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96/ Section 323 (a)(1).

fiscal effort from non-federal sources for the preceding fiscal year must not be less than its combined fiscal effort for the second preceding year by more than 5 percent unless such a reduction was occasioned by an unusual event (exact language of regulation quoted below).

The language and policy of this regulation are based upon the statutory language as it existed prior to the 1976 amendments; its meaning and scope have caused substantial confusion and uncertainty in a number of states. In addition, issues have been raised regarding the respective roles of OE and the SEAs in administering this provision. For example, which agency is responsible for establishing the parameters of the proviso, OE or the SEAs, and which agency is ultimately responsible for applying the standards to the facts of a particular case? Set forth below is a discussion of these issues.

2. Meaning and Scope of the Proviso

The existing Title I regulations provide in relevant part, that any reduction in fiscal effort by a LEA for any fiscal year by more than 5 percent

> will disqualify a local educational agency unless the local educational agency is able to demonstrate to the satisfaction of the State Educational agency that such a reduc-

> tion was occasioned by an unusual event, such as the removal of a large segment of property from the tax rolls, that could not have been fully anticipated or reasonably compensated for by the local educational agency . . . (emphasis added)

Perhaps because the existing regulations contain only one illustration clarifying the scope and meaning of the "unusual event" proviso, OE has, on several occasions offered further clarification in internal memoranda and correspondence with various SEAs.

In a letter to one state, OE explained that "a sudden decrease in the local tax base, a major change in enrollment, or in the method of computation of special state assistance may be considered in determining whether or not such a local educational agency should be disqualified."

Former Secretary Weinberger of HEW in a letter to a second state explained that the exception is designed to provide relief in instances where a disaster or the closing of a vital industry has caused a sharp and unanticipated reduction in the value of property on the tax rolls.

In an OE internal memorandum, the following hypothesis was offered for the purpose of raising an issue rather than as an interpretation:

> Where a sharp recession causes sharp unemployment which in turn causes state tax revenues under a state income tax substantially to decrease, can the state be said to be maintaining fiscal effort where the tax rate (or tax assessment policy) remains constant?

In addition to offering illustrations describing circumstances which constitute or may constitute an unusual event, OE has offered interpretations explaining circumstances which do not constitute an "unusual event".

In a letter to a third state, OE stated that:

> It should be understood that any decrease in fiscal effort at the local level due to or attributed to a general decrease in State assistance throughout the State would not be considered as a sufficient basis for qualifying a local educational agency with a decrease in fiscal effort in excess of the five percent allowed by the regulations.

In a letter to the second state, Secretary Weinberger explained that the failure of the electorate to pass a special tax levy is not such an "unusual event".

> Failure of the voters to approve a special tax levy is not [an unusual event]. The approval or disapproval of a tax levy is something that is within the control of the community which the local educational agency serves.

The letter set forth the rationale for reaching the above conclusion.

> If the failure of the electorate to maintain or support State or local revenue measures for education could be viewed as a circumstance which would justify reduction in local fiscal effort, then the maintenance of effort provision of Title I ... would have little or no effect.

The second state contended that because the success of a special tax levy was subject to the "inexplicable variables attendant to an electoral process", and not within the direct control or power of the LEA (i.e., the board of directors of a school district, 45 C.F.R. §116.1(r)), such an event should constitute an "unusual event ... that could not have been fully anticipated or reasonably compensated for by the local educational agency." In other words, the state made a distinction between acts by the school board and acts by the electorate in defining the concept of what constitutes an act by the LEA.

In addition to the general rejection of this interpretation as referred to above, Secretary Weinberger offered a restatement or clarification of the existing regulations.

> The 'unusual event' exception is meant to provide relief to LEAs in cases where the reduction in fiscal effort results from an occurence that is not under the control of the local educational agency or the community which it represents. (emphasis added)

3. The Role of the SEA and OE In Determining What Constitutes An Unusual Event

One further aspect of the "unusual event" proviso has been a recent topic of dispute. The existing regulations, as quoted above, provide in relevant part, that:

> unless the local educational agency is able to demonstrate to the satisfaction of the State educational agency that such a reduction was occasioned by an unusual event ...
> (emphasis added)

One State has construed the underlined phrase to mean that the SEA "alone" has been delegated the authority/responsibility to determine whether an LEA has experienced an unusual event. However, although OE, in a 1969 letter to a second state, has stated that "the regulations do permit a determination by the SEA that a decrease of more than 5 percent in the expenditures per pupil was caused by an "unusual event", the scope of SEA authority had clearly been limited by OE, as evidenced by the above OE interpretations.

4. Policy Analysis, Recent Changes and Recommendations

The foregoing summary of the confusion and controversy surrounding the meaning and scope of the "unusual event" proviso demonstrates how necessary it was for certain clear, policy-based decisions to be made absent express legislative standards in this area. OE properly issued unofficial interpretations based upon its analysis of the policies and purposes underlying Title I. These interpretations were open to dispute by the states, which often found it difficult to translate or incorporate OE interpretations into their administration of Title I. Given this situation, Congressional resolution of the disputes involved was a natural result. Thus, in the Education Amendments of 1976, Congress clarified the meaning of the "unusual event" proviso and OE responsibility for its administration. These changes are described below.

In the place of the "unusual event" proviso, Congress has imposed a dual-pronged waiver system. First, in cases involving "exceptional circumstances," OE may grant a one year waiver of the "maintenance of effort" requirements where such a waiver is determined" to be equitable in order to reflect such circumstances, including those resulting from decreasing enrollments or fiscal resources "of the SEA or the LEA, or both. In such a situation, the amount of federal payment for that fiscal year must be decreased proportionately[97].

Second, in cases involving "very exceptional circumstances," OE may grant a similar waiver for one year.[98] However, in contrast to the first waiver provision."very exceptional circumstances" do not necessitate a reduction in Title I payments. Instead, the full amount of Title I funding may be maintained.

The Conference Committee Report accompanying the Education

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[97] Section 431 A(b)(2)(A).
[98] Section 431 A(b)(2)(B).

Amendments indicates the following types of "very exceptional circumstances" to which coverage extends; note that the last example relates directly to OE's contrary position taken in response to the same circumstances.

> (a) the tax base of a local educational agency has decreased very significantly, e.g. removal of property from the tax roll because of urban renewal, government acquisitions of previously taxed property in substantial amount, or natural disaster of taxable property; (b) the capacity to raise funds is out of the control of a local education agency because of a very substantial need to reduce fiscal resources, or fiscal resources have been diverted very significantly to other functions which are not within the control of the board; (c) situations that occur in States where State law requires that each school district must go to the voters for special levies to meet operating expenses over and above those guaranteed by the State; and further, State law prohibits a school district from trying more than twice in any one year to obtain voter approval of a school maintenance and operation levy . The managers would expect the Commissioner to assure that the school district had made every possible effort to comply before granting a waiver. (at 233)

Further, OE is responsible for establishing "objective criteria for general applicability to carry out the waiver authority "[99]. In addition to this responsibility, the new amendments emphasize the decision making supremacy of OE by requiring OE notification and approval of all such waivers [100] OE's current approach in the exercise of its authority is also bolstered; the Conference Report indicates that "implementation of this waiver authority will be carried out in a manner consistent with existing decisionmaking practices and relationships

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[99] Section 431 A(b)(3)

[100] Section 431 A(a)(1)(C);section 431 A(b)(2)

among the Commissioner, State agencies, and local educational agencies, under the Elementary and Secondary Education Act, Title I operations."[101]

The above legislative changes have addressed the key issues of controversy surrounding the "unusual event" proviso. As a result, the Legal Standards Project makes no recommendations in this regard. Nevertheless, because OE's role is crucial in this area, we wish to emphasize that OE should promulgate specific objective standards, including a number of examples, for purposes of establishing the clear metes and bounds of the waiver provisions and avoiding the problems which arose with respect to the "unusual event" proviso.

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[101] Conference Report to the Education Amendment of 1976, H.R. No. 94-1701, 94th Cong. 2d Sess. (1976) at 233.

III. Minimum Monetary and Numerical Standards For Determining School District Eligibility

Under the Title I legal framework, the eligibility of school districts to apply for Title I funds is limited by the number of children from low-income families residing in the school district and the size of its program. Set forth below is a description of the existing federal legal framework and representative state interpretations and additions.

The Title I legal framework provides that a school district is eligible to apply for Title I funds if there are at least ten children between the ages of 5 and 17 from low-income families residing in the school district. If such data is not available the school district is still eligible if the school district is located within a county which has ten or more children from low-income families. (Section 103 of Title I)

With respect to the minimum size of the program, the Title I framework provides that a program or project must involve an expenditure of not less than $2,500. (Section 141(a) of Title I). However, the Title I statute authorizes the SEA to reduce the $2,500 requirement if it determines "that it would be impossible for reasons such as distance or difficulty of travel for the applicant to join effectively with other local educational agencies for the purpose of meeting the requirement." (Section 141(a) of Title I). This Section also authorizes the establishment of cooperative programs between LEAs.

Although most of the states included in the survey do not make an express reference to the 10 children minimum, such information is readily apparent from the Title I application.

Several states have interpreted and made additions to the $2,500 requirement. In one state the SEA allows an LEA to reach the $2,500 figure by supplementing it with its own funds. The state application requires the LEA to explain how the funds will be applied to the project.

In another state the SEA has established $3,560 as the minimum for operating a Title I program. LEAs with entitlements below that figure are ineligible unless they form a cooperative project with another LEA.

In a third state school districts with an entitlement under Title I of $25,000 or less must enter into a cooperative program "in order that a comprehensive program for eligible children in those districts be developed and implemented."

No changes are recommended regarding these requirements.

IV. Restrictions Concerning The State Aid Formula, Including Policy Analysis and Recommendations

Under the existing legal framework, the state in which the LEA is located, may not take into consideration payments under Title I in determining (a) the eligibility of the LEA for state aid, or (b) the amount of the state aid for the present year or for the preceding fiscal year, for example, by reducing state aid by the amount of Title I funds received by its LEAs.

In most of the states included in the survey, there is no mention of this requirement in the SEA application or the state plan. The SEA's assurances to OE do not include this requirement. In short, there is no recognition that this provision exists.

We recommend that this section (Section 143(c)(1) of Title I) be renumbered as section 142(a)(4) of Title I. This amendment would have the effect of requiring the SEAs to sign an assurance that it has complied with the requirement. Further, we recommend that OE clarify in its regulations that this provision in no way prohibits a district receiving large sums of Title I funds from receiving "extra" state aid. The provisions merely act to prohibit state penalization of such school districts.

CHAPTER 2

SCHOOL ATTENDANCE AREA ELIGIBILITY AND TARGETING

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CHAPTER 2
SCHOOL ATTENDANCE AREA ELIGIBILITY AND TARGETING PROVISIONS

I. Introduction

A. Overview of the Federal Legal Framework

The primary purpose of Title I is to provide supplementary programs to educationally deprived children residing in areas having high concentrations of children from low-income families. The Congressional Declaration of Policy (Section 101) explains:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies with concentrations of children from low-income families to expand and improve their educational programs by various means (including pre-school programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

The legislative history accompanying the initial legislation summarized testimony of witnesses explaining the effects of poverty on the failure of children in low-income areas to perform successfully in school.

> Testimony presented to the committee illustrated sharply and starkly that the conditions of poverty or economic deprivation produce an environment which in too many cases precludes children from taking full advantage of the educational facilities provided...Environmental conditions and inadequate educational programs rather than lack of basic mental aptitude carry the major responsibility for the later failure of these children to perform adequately in the school system. 102/

It was the close relationship between conditions of poverty and educational disadvantagement that led Congress to use low-income data as an appropriate criterion for allocating funds to school districts and areas within school districts. Subsequent committee reports further explained the reason for this device of distributing funds based on low-income data,

> this device of distributing funds is used solely for the purpose of placing funds where the educational needs are greatest...Because of the close correlation between educational achievement and low-income, family income data are considered an effective means of distributing money for the purpose of meeting the educational needs of disadvantaged

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102/ S. Rpt. No. 146,[1965 U.S. Code Cong. and Adm. News 1450 (1965).

> or educationally deprived
> children. [103]

To summarize, Title I funds are allocated to school districts according to the number of children from low-income families residing in the district (see *supra*.). The school district, in turn, allocates Title I funds to school attendance areas[104] having high concentrations of low-income families. Once the project areas[105] are selected, every child who is considered educationally deprived, regardless of the families economic status is eligible to receive benefits--i.e., educational deprivation is the sole criterion for determining which children within low-income areas may actually participate in Title I programs.

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[103] House Report No. 91-114, 91st Congress, 1st Sess. (1969) at p. 3.

[104] The term "school attendance area" is defined in the Title I regulations (45 C.F.R. §116.1(b)(1974) to mean "in relation to a particular public school, the geographical area in which the children who are normally served by that school reside."

[105] The term "project area" is defined in the Title I regulations (45 C.F.R. §116.1(v)(1974) to mean "the attendance area or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the location of the project itself, is designated as the area whose children are to be served by the project."

Specifically, the legislation provides that Title I funds may be used by LEAs for programs and projects "which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." (emphasis added) [106]

According to the regulations issued by OE, the LEA may use either of two methods to determine which school attendance areas within a school district are considered as "having high concentrations of children from low-income families." Under the first method, only those school attendance areas with a percentage of children from low-income families as high as the district-wide average are eligible to participate in Title I programs ("percentage method"). Under the second method, only those school attendance areas in which the number of such children is as large as the average number of such children per attendance area in the district are eligible ("numerical method").

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[106] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)). See supra. at p.27 for definition of "low income family" used in the Title I grant formula. For purposes of LEA determination of eligible school attendance areas, the act and regulations do not prescribe the source of data to be used nor what income level defines a family as "low-income." Section 1.1 of Program Guide 44 states that in determining eligibility, "...it is not necessary for the LEA to use a particular income level, although a level of $2,000 or $3,000 would be appropriate, but the same level should be used for all attendance areas." And likewise, "whatever data are used must be used uniformly throughout an applicant's district".

Specifically, the regulations provide that a school attendance area is eligible to participate in a Title I program if:

> (1) the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if
>
> (2) the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. [107]

The statutory and regulatory provisions described above, concerning school attendance area eligibility requirements, generally operate wherever definite school attendance areas have been established. However, where there are no well-defined school attendance areas, e.g., under an open enrollment policy, the guidelines provide that the LEA should redetermine which of its schools are eligible for Title I projects "on the basis that the incidence of children from low-income families in those schools is as high or higher than the average incidence for all schools in the district".[108] In other words, in this case the poverty of children actually enrolled in schools is used to determine eligibility rather than the poverty of children residing in the attendance area.

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[107] 45 C.F.R. §116.17(d)(1974).

The only exception contained in the regulations to the general rules for determining school attendance area eligibility involves the situation where there are no wide variances in the concentrations of children from low-income families among the school attendance areas in the school district. If such a situation exists, "the whole of a school district may be regarded as an area having a high concentration of "children from low-income families and "be approved a a project area".[109]

108/ Program Guide No. 64 (January 21, 1971), redesignated Program Directive Inst. L211.1 (hereinafter referred to as Program Guide No. 64). Program Guide No. 64 superseded Program Guide No. 28 (February 27, 1967), which previously provided some guidance for adapting Title I requirements to school districts which have undergone desegregation.

109/ 45 C.F.R. §116.17(d)(1974); See Program Guide No. 44, Section 1.1. An OE handbook entitled: Title I ESEA: Selecting Target Areas (DHEW Publication No. (OE) 72-38 states that "in a very few districts" the entire school district may be designated as a single area of high concentration and be designated as a project area if the "variation is significantly less than the average variation for that State." (p. 16)

Prior to 1974, the Title I legislation did not permit a LEA to satisfy the eligibility requirements by determining the number of children from low-income families _actually enrolled in a school_ unless the attendance areas were not well-defined. The school district was required to determine eligibility by counting the number of children from low-income families _residing in an attendance area_ within the school district.

Under the Education Amendments of 1974 [110] a LEA may, "at its discretion" use Title I funds for educationally deprived children attending a _school not located in an eligible school attendance area_ if "the proportion of children in actual average daily attendance from low-income families is substantially the same as the proportion of such children" [111] in an eligible attendance area. This deals with the situation in which the percentage of low-income children residing in an attendance area may be low but, because higher income children are not in the public schools, the public school has a high proportion of low-income children.

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[110] P.L. 93-380 (August 21, 1974).

[111] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

The second addition prevents a formerly eligible school from losing its eligibility because of a change in its ranking. Prior to 1974, a school attendance area which was designated as a project area for a particular year could not continue to be designated as a project area during the next year if it failed to meet the general school attendance area eligibility requirements described supra. The Education Amendments of 1974 provide that an eligible attendance area which has been selected as a project area will continue to be eligible to be designated as a project area for at least two additional years.

Specifically, Title I, as amended, now specifies that:

> ...Where a school attendance area does not meet the requirements of [Section 141(a)(1)]...but did meet the appropriate requirement in either of the two preceding fiscal years, that school attendance area shall be considered to meet the applicable criterion for that fiscal year. 112/

112/ Section 141(a)(13) of Title I (20 U.S.C. 241e(a)(13)).

The Title I legislation also provides that Title I programs and projects must be of sufficient size, scope and quality to give reasonable promise of success in meeting the special educational needs of such children. [113] In order to satisfy this requirement, when sufficient funding to provide such programs in all eligible schools is not available, LEAs must target, i.e., select from among the eligible school attendance areas, those areas whose children will actually be served by programs under Title I. The procedure for targeting attendance areas is not clearly stated in the regulations, although the guidelines issued by OE provide that LEAs should make sure that areas with the highest concentrations of children from low-income families are targeted before areas with lower incidences of poverty are served. [114]

113/ Section 141(a)(1)(B) of Title I (20 U.S.C. 241e (a)(1)(B)).

114/ Program Guide No. 44, Section 4.6.

B. Organization of This Chapter

This chapter sets forth our analysis of the school attendance area eligibility and targeting provisions. The first section of this chapter will describe the general rules for determining school attendance area eligibility, followed by a discussion of the various options and exceptions to these general rules. Specifically, we will analyze the no-wide variance exception, the enrollment option, the "formerly eligible" rule, the proposed thirty-percent rule, separate rankings for grade spans, and the feeder pattern concept.

The next section of this chapter analyzes the selection and proper use of data sources for determining eligibility, including a discussion of the concept of a minimally acceptable data source, uniform use of data, and problems concerning data sources.

The third section of this chapter concerns the standards for targeting school attendance areas. The focus of this section is the so-called "no-skip" provision and the various justifications for skipping a higher ranked school.

The final substantive section of this chapter describes the operation of school attendance area eligibility and targeting requirements in school districts undergoing desegregation.

C. Overview of the Major Issues, Conclusions and Recommendations

The Legal Standards Project offers several recommendations for the improvement of the Title I school attendance area eligibility and targeting requirements. They are specifically set forth in the main body of this section. An overview of these recommendations expressed in more general terms is presented below.

Before we describe some of the more important issues, several general reactions to the federal school attendance area eligibility and targeting requirements should be considered for purposes of understanding the context in which such analysis is undertaken.

First, the existing school attendance area eligibility and targeting requirements offer substantial flexibility to LEAs within a specified framework limiting the total number of schools which may receive Title I funds. For example, under the eligibility provisions, the LEA can focus Title I funds on particular grade spans (elementary v. secondary), or on schools of a particular size (large schools v. small schools).

In addition, LEAs may target schools which were formerly eligible but no longer qualify under the "formerly eligible rule". Under the proposed regulations they can target schools with 30 percent or higher poverty level, regardless of the district-wide average. If there are no-wide variances between areas they may deem all areas as eligible to receive Title I funds, without regard to the de minimis variations in low-income statistics.

With respect to the targeting provisions, although the "no-skip" provision generally requires that the highest ranked schools (based on economic criteria) may not be skipped, the proposed regulations also include the proviso--that where a lower ranked school has a substantially greater incidence of educational deprivation, the higher ranked school may in fact be skipped. Thus, the degree of educational deprivation can be used as the primary indicator for ranking purposes under specified circumstances.

Second, the school attendance area eligibility requirements are generally clear and precise, causing little practical or interpretative problems. The recommendations made in the subsequent pages are minor and, in the main are simply an attempt to "fine-tune" the regulations.

The analysis of the school attendance area targeting requirements primarily concern the confusions stemming from the legal form in which the requirement appears rather than the clarity of the requirement. When changes have been recommended they related primarily to facilitating increased flexibility to the existing regulations.

The school attendance area eligibility requirements are generally internally consistent. No problems in this regard were identified. The problems which surfaced concern the legal status of the "no-skip" aspect of the school attendance area targeting requirements. These problems stemmed primarily from inconsistent or erroneous statements of policy in the various OE official and unofficial sources. The March 11, 1975 proposed regulations have rectified these problems. We have recommended that these proposed regulations be adopted.

The current regulations provide sufficient guidance for purposes of determining school attendance area eligibility. The regulations are clear and objectively phrased. However, the regulations contain no guidance regarding the methods and suitability of data sources to be used for determining eligibility. We recommend that guidance presently provided in OE handbooks be incorporated into the regulations as minimum standards.

Prior to the publication of the March 11, 1975 proposed rules, OE had not established an objective standard for applying the no-wide variance exception to the general school attendance area eligibility rules. As a result, the SEAs developed somewhat divergent interpretations. We recommend that the March 11, 1975 proposal, which contains an objective standard be adopted, with one modification which will add flexibility without jeopardizing the operation of the proviso.

With respect to the targeting of school attendance areas, we found that the existing legal structure provides insufficient guidance in several respects. First, Program Guide No. 44 and the proposed regulations contain insufficient guidance concerning what constitutes sufficient justification for skipping a lower ranked area. We recommend that specific examples be included. Second, the legal framework provides insufficient guidance regarding the responsibilities of the SEA in deciding whether an LEAs explanation for skipping a lower ranked school is adequate. OE's responsibility is to issue clear standards; the SEAs' responsibility is to apply these objective standards to the facts of a particular case, subject to final review by OE.

Fourth, the existing legal framework provides insufficient guidance concerning the relationship of this requirement to such other requirements as the eligibility and targeting of children, concentration, and comparability requirements. We recommend that the relationships be clarified.

Two final areas in which there is insufficient guidance concerns the separate ranking of school attendance areas according to grade span and the operation of these requirements in school districts undergoing desegregation. We recommend that the regulations be amended to permit the separate rankings by grade span. Further, we recommend that the regulations specifically explain the operation of the rules in school districts undergoing desegregation, including guidance for districts undergoing mid-year desegregation.

II. Standards for Determining School Attendance Area Eligibility, Including 1974 Statutory Amendments

A. Introduction

This section of the chapter will describe and analyze the following aspects of the school attendance area eligibility requirements: general school attendance area eligibility rules, the no-wide variance exception to these general rules, "enrollment option", "formerly eligible rule", the proposed "30 percent rule", separate rankings for each grade span grouping, and the feeder pattern concept.

Under each heading we will describe the existing federal legal framework, the various state legal frameworks, and then undertake an analysis, including appropriate recommendations.

B. General School Attendance Area Eligibility Rules

1. Federal Legal Framework

As explained supra., under the Title I legislation, school attendance areas must have "high concentrations of children from low-income families" to be eligible for grants under Title I (Section 141(a)(1)(A) of Title I). This statutory standard is defined clearly and objectively in the regulations issued by the Office of Education: those school attendance areas with a percentage or number of children from low-income families as high as the district-wide average are eligible to participate in Title I programs and projects (45 C.F.R. §116.17(d)(1974)).

Thus, according to the regulations, the LEA may use either of two methods to determine which school attendance areas within a school district are considered as "having high concentrations of children from low-income families".

Under the first method, only those school attendance areas with a percentage of children from low-income families as high as the district-wide average are eligible to participate in Title I programs. Under the second method, only those school attendance areas in which the number of such children is as large as the average number of such children per attendance area in the district are eligible.

The guidelines issued by OE provide that normally the eligibility of school attendance areas should be determined by ranking them according to the percentage method. However, the guideline provides that "in districts with extremely large variations in the sizes of the populations of its attendance units, such units may be ranked according to the average number of children per attendance unit." [115]

Section 1.1 of OE Program Guide No. 44 also provides that "if necessary for reasons of equity, the attendance units determined to have high concentrations of children from low-income families may have some areas ranked on one basis and some on the other." However, in such a case, "the total number of attendance areas accepted as eligible for Title I purposes should not exceed the number of such units that would have been eligible if only one basis, i.e., percentage or average number of children from low-income families, had been used." These requirements are explained in greater detail in an OE handbook entitled, Title I, ESEA: Selecting Target Areas.

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[115] Program Guide No. 44, Section 1.1 (March 11, 1968). This Guide also contains standards concerning the uniform use of data sources and the level of poverty utilized. These standards are described *infra.* at p. 172.

2. State Legal Framework

Most of the states included in the survey have incorporated these federal statements into their own state materials with no modification. Thus, these general federal requirements have not been the subject of state interpretation. The specific aspects of the eligibility requirements which have been the subject of varying state interpretations are described infra.

3. Policy Analysis and Recommendations

The general school attendance area eligibility requirements set forth in the existing regulations have not been amended since 1968. The states we visited expressed no problems respecting the operation of these rules. However, one state Title I Director did question the basic definition itself, explaining that there should be no cut-off point for purposes of determining eligibility. "Title I funds should be available for use by any school in the district having a significant percentage of educationally deprived children."

When we asked other SEA Title I Directors their opinions concerning this issue, some agreed, others voiced strong disagreement." As one SEA Title I Director explained, "the present regulations provide strong backing for resisting strong local pressures to dilute the Title I services. Today these pressures are enormous in light of the present economic recession. Please don't allow any additional leeway to the present requirements under present circumstances, given the existing level of Title I appropriations. We can't come close to serving all of the children within schools deemed eligible under the existing rules."

This controversy is not new. In 1966, in response to pressure from several states, OE's initial set of regulations included the basic standards described above as well as the following proviso:

> Other areas with high concentrations of children from low-income families may be approved as project areas but only if the state agency determines that projects to meet the most pressing needs of educationally deprived children in areas of higher than average concentration have been approved and adequately funded.

Bailey and Mosher in a book entitled, ESEA: The Office of Education Administers a Law (at p. 119) reports the comments of an OE official following the promulgation of this regulation, "that is when we gave away the ball-game."

As explained supra., the 1968 regulations deleted this option.

We recommend that the existing general school attendance area eligibility rules not be amended to incorporate the proviso formerly included in the formal legal framework. We also recommend that if and when the level of funds appropriated by Congress approaches the level of funds authorized, that OE should consider, following careful study, proposing such an alternative.

The effect of such an amendment under the present level of appropriations could be to dilute the effectiveness of Title I programs in schools with the greatest number of educationally deprived children from low-income families. As explained to us by several SEAs, this dilution could occur at a time when LEAs cannot even approach serving all educationally deprived children in areas deemed eligible under the existing provisions.

It is our conclusion that the existing regulations offer substantial flexibility with respect to determining school attendance area eligibility. The sections which follow describe the range of alternatives available to LEAs.

C. No-Wide Variances Exception To The General School Attendance Area Rules

1. Overview of Federal Legal Framework

Since 1965, the regulations (45 C.F.R. §116.17 (b)(1966)) issued by OE have included an exception to the general school attendance area eligibility requirement. The present regulations (45 C.F.R. §116.17(d)(1974)) provide that:

> In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children, and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district .

As explained *supra.*, in a handbook entitled *Title I ESEA: Selecting Target Areas*, OE explained that in very few districts, "the entire school district may be designated as a single area of high concentration and be designated as a project area if the variation is significantly less than the average variation of that state" (p. 16).

2. State Legal Framework

The states included in the survey have pursued varying policies regarding the no-wide variance exception.

In one state, an area supervisor indicated that prior to the promulgation of the proposed regulations, the SEA did not allow an LEA to utilize the exception. In a second state, the SEA still does not allow LEAs to utilize the exception. In a third state, the SEA allows LEAs to utilize the no-wide variance exception, employing the criteria set forth in the proposed regulations.

Three other states have attempted to define the broad standard set forth in the targeting handbook and quoted above. In one of these states, the state-wide average is 19 percent. The SEA has interpreted a variation of 5 percent to be "significantly less" than the variation in the state. In the second state, "significantly less" was interpreted to mean one-half the state-wide average, which was 4.586 percent. In the third state an 8 percent figure was used.

The existing regulations do not explain the significance of the determination that a school district may take advantage of the no-wide variance exception to the school attendance area eligibility requirement with respect to the other Title I requirements, other than by expressly providing that the comparability requirements are inapplicable (45 C.F.R. §116.26(c)(1974)) and by direct implication that §116.17(h)(3) is inapplicable. This latter section provides that Title I funds "will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with state and local funds to children in non-project area schools." Thus, if the whole of a school district is regarded as a project area, then by definition there are no "non project" area schools with which to compare it.

Most of the states interviewed agreed that all other Title I requirements still applied. If, for example, a school district has invoked the no-wide variance rule, it would nonetheless be required to comply with the regulation that Title I funds"...be concentrated on a limited number of projects and applied to a limited number of educationally deprived children..." so as to give reasonable promise of success in the project.

In three states, the SEAs stated that generally if a school district qualifies, the Title I program is generally provided in all eligible schools. However, one state added that if the LEA is unable to satisfy the concentration requirements, it will rank schools based on the number of educationally deprived children in the various schools.

Another state, on the other hand, would still require that the LEA rank the school attendance areas in order of the incidence of children from low-income families, although the differences will be de minimis.

In all states included in survey, with one exception, if the LEA does not target all eligible schools, the LEA must comply with the comparability requirements and the supplanting restriction cited to above. In one state, the Title I Director stated that where a school district qualifies for the no-wide variance exception, then every school in the district should be compared to every other school, rather than doing away with the comparability requirement altogether.

Two states expressed concern over the objective standard for determining no-wide variance as set forth in the proposed regulations. The Title I Director in one state explained that the district-wide variance in a large number of LEAs in the state is already so low that the notion that the LEA must divide the variation between the areas with the highest and lowest percentage by three is "idiotic". He would suggest an option allowing a flat figure.

3. Policy Analysis and Recommendations

The above discussion raises several issues regarding the application of the no-wide variance proviso. But before we discuss these issues, a brief mention should be made concerning the framework within which this proviso operates.

The no-wide variances exception reflects the fact that if all school attendance areas have approximately the same incidence of poverty, the poverty criterion will be of little value in determining which areas have the highest incidences of educational deprivation. In this case, LEAs may disregard economic criteria and directly select attendance areas and children to be served with Title I programs on the basis of information concerning educational deprivation.

Although the regulations do not specify who is responsible for deciding whether there are "no-wide variances", it is implicit that such responsibility rests with the SEA since the SEA is generally responsible for approving LEA applications for grants under Title I.

Current regulations and guidelines issued by OE do not establish a standard for determining "no-wide variance." The only guidance offered is contained in an OE handbook entitled: Title I ESEA-Selecting Target Areas. This handbook provides that,

> "In a very few districts, there may be no-wide variances in the concentration of children from low-income families. In such cases, if the variation is significantly less than the average variation for that state, an entire school district may be regarded as a single area of high concentration." (emphasis added)

The March 11, 1975 proposed regulations include an objective standard for determining when there are no-wide variances in the concentration of children from low-income families. (§116a.20, 40 FR 11481)

> "Such a determination may be made only if the variation between the areas with the highest and lowest percentage of such children is not more than one-third of the average percentage of children from low-income families in the district as a whole."

The proposed regulations contain an objective standard for determining whether an LEA can take advantage of the no-wide variance proviso to the school attendance area eligibility requirements. The standard is that the variation between the highest and lowest percentage of children from low-income families is not more than one-third the average of low-income children for the district as a whole.

The question remains as to whether the standard, as proposed, is sound. Although we generally agree with the standard, it appears that the standard operates inequitably in wealthy school districts wherein the average percentage of children from low-income families is small. The following examples illustrate the point. In hypothetical LEA No. 1, a poor district, the average percentage of low-income children in the school district is 54 percent. The highest percentage is 62 percent and the lowest is 46 percent, a difference of 16 percent. Taking one-third of 54 percent, which is 18 percent, it is clear that this poor district qualifies for the no-wide variance rules based on a difference between the highest and the lowest of 16 percentage points. In hypothetical LEA No. 2, the average percentage is 6 percent: the highest is 8 percent and the lowest is 4 percent, a difference of 4 percentage points. Since one-third of 6 is 2 percent, the LEA does not qualify.

It would appear that regardless of the wealth of a district, there should be a floor which serves as the percent figure used to compare the highest to the lowest in the district. Since in wealthy districts a percentage difference of e.g., 4 percent which is de minimis would not qualify, we recommend that OE study the possibility of arbitrarily setting a figure.

A second issue relating to this proviso concerns its operation in a school district which has decided to target only one grade span, e.g., elementary schools. Should this LEA use district-wide or grade-span figures for purposes of computing no-wide variances? Where the LEA restricts the use of Title I funds to the elementary school level, we recommend that the standard be the district average for that particular grade-span. It seems unreasonable to require the LEA to include schools at the secondary level if the LEA is only planning to serve the elementary schools.

The final issue is relevant in the context described below. Where an LEA which satisfies the objective standard described above, decides pursuant to the concentration requirements not to designate all eligible areas as project areas, may the LEA, nonetheless, actually take advantage of the no-wide variance exception or must it use the general rules for determining school attendance area eligibility? What standard should the LEA use for targeting purposes?

With respect to which criteria to use, we recommend that the regulations be clarified to permit the LEA to use the no-wide variance standard even though it does not contemplate designating all areas as project areas, since the rationale for the exception applies equally to situations where all or some areas are designated as project areas. That is, where the differences in low-income averages are not significant, the use of such averages as a proxy for determining the degree of educational deprivation is meaningless.

Consistent with the above rationale, we recommend that the LEA may target based on data concerning educational deprivation rather than economic criteria if comprehensive data which is documentable for audit purposes is available. Otherwise, the LEA must use low-income data.

Under the existing regulations, if an LEA pursuant to the no-wide variance rule targets all eligible attendance areas, that LEA need not submit a comparability report because there will be no non-project areas to which the project area schools may be compared. Under the Title I statute and regulations, services provided in each project area school must be comparable to services provided in non-project areas.

Although we agree conceptually with one SEA which requires that a no-wide variance school district must demonstrate that no school varies by more than 5 percent, the present language of the statute clearly does not require such a demonstration. We agree conceptually because even in this situation there is still a possibility that certain project area schools are being provided with substantially fewer services than other schools. In those schools, Title I funds will not be used to provide supplementary services.

However, before we recommend that Congress amend the statute to require the demonstration of comparability under the above described circumstances, we recommend that OE study the application of the standard prescribed in the proposed regulations to determine whether a substantial number of LEAs are taking advantage of the provision and whether there are in fact substantial variations in the provision of services between the schools.

D. Enrollment Option

1. Overview of Federal Legal Framework

Prior to 1974, the Title I legislation and regulations required that the LEA determine eligibility on the basis of residency data rather than enrollment data, except where the area boundaries were not well-defined. The 1974 Education Amendments, now allow an LEA, under certain circumstances, to designate a school a "project school" even if it is not located in a project area.

The legislative history accompanying the 1974 Education Amendments explains the purpose of this addition.

> Existing law links eligibility as a Title I school with the location of the school in an attendance area with a high concentration of children from low-income families. However, in some school districts, because of the attendance of children in non-public schools, the economic composition of the attendance area served by a public school is not reflective of the economic level of the children actually enrolled. Existing law would bar the designation of such a school even though its actual enrollment would qualify it to be a Title I target school under the poverty criteria utilized by the school district [116].

2. State Legal Framework

Although it is more than two years since the passage of the 1974 Education Amendments, it is interesting to note that the written materials in a number of states still do not reflect the addition of the enrollment option.

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[116] Senate Report No. 93-763, 93rd Cong., 2nd Sess. at p. 30.

Two states explained that the states' orientation toward the use of school lunch data makes the amendment basically irrelevant since the school lunch data is actually enrollment rather than residency data anyway. In one state the Title I Director said that he disregards the enrollment option and sticks to the ranking of schools according to the incidence of poverty in school attendance areas.

3. Policy Analysis and Recommendations

Pursuant to the 1974 Amendments a school may receive Title I funds and thereby be considered a "project school", although it is not a "school serving a project area". [117/] However, in numerous places throughout the Title I regulations (existing and proposed) references are made to "school attendance areas" and "project areas", [118/] without referencing the fact that a school may be a project school without serving a project area. We recommend that this technical

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[117/] See Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)).

[118/] See e.g., the 45 C.F.R. §116.17(a), §116.17(d), §116.26.

inaccuracy be rectified in the next set of regulations to avoid any confusion.

E. Formerly Eligible Rule

1. Overview of the Federal Legal Framework

A second addition to the Title I statute resulting from the 1974 Education Amendments prevents a formerly eligible school from losing its eligibility because of a change in its ranking. Prior to 1974, a school attendance area which was designated as a project area for a particular year could not continue to be designated as a project area during the next year if it failed to meet the general school attendance area eligibility requirements described supra. The Education Amendments of 1974 provide that an eligible attendance area which has been selected as a project area will continue to be eligible to be designated as a project area for at least two additional years.

Specifically, Title I as amended, (Section 141(a)(13) of Title I) now specifies that:

> ...where a school attendance area does not meet the requirements of [Section 141(a)(1)]...but did meet the appropriate requirement in either of the two preceding fiscal years, that school attendance area shall be considered to meet the applicable criterion for that

fiscal year.

The legislative history explains the basis for this addition:

> The Committee has adopted this amendment in response to pleas from educators during our hearings that the present law and regulations frequently result in new listings of participant schools every year. This type of constant shifting among schools is bound to be disruptive of any sound educational program. 119 /

2. State Legal Framework

Although two states explained that the formerly eligible rule had not been used to date, it is unclear whether the states would disapprove an application if a LEA took advantage of the amendment. It does appear that the SEAs have not attempted to explain this option to the LEAs.

119/ House Report No. 93-805,[1974]U.S. Code Cong. and Adm. News 4108.

In two other states, the SEAs have interpreted the rule as a local option, i.e., the LEA may, but need not, allow a formerly eligible school to maintain its eligibility.

In another state, the Title I Director expects that this provision will see substantial utilization if and when the section of the proposed regulations containing the objective test for determining no-wide variances (see infra.) is finally adopted. This is because over 70 percent of the LEAs in the state take advantage of the no-wide variances exception to the general eligibility requirements and many of these LEAs will not be able to meet this new test.

3. Policy Analysis and Recommendations

For an analysis of this statutory provision as it relates to the "no-skip provision" see infra. at p. 194. Set forth below is an analysis of the provisions as it relates to the concentration requirement.

Under the formerly eligible provision, it is likely that the number of schools eligible to receive Title I will increase (eligible and formerly eligible). To the extent that all eligible schools are targeted, the LEA, given a static level of federal funds, will probably have to serve a smaller percentage of educationally deprived children.

To ensure that the LEA does in fact comply with the concentration provision, i.e., it does not dilute the effectiveness of Title I funds, we recommend that any LEA utilizing the formerly eligible provision must demonstrate in its application that it is not serving any more children that would have been served but for the existence of the proviso.

F. Thirty Percent Rule

1. Overview of the Federal Legal Framework

The OE handbook entitled Title I, ESEA: Selecting Target Areas, describes the rules for determining, among other things, which school attendance areas are eligible to receive Title I funds. After setting forth the general rules, described *supra*., the handbook states, "in specific cases, and with the approval of the State Educational agency, an area where 30 percent or more of the children are from such families may also be designated as a project area."

The handbook bases this policy on what is described as a final regulation appearing in the *Code of Federal Regulations*. In fact, the 30 percent rule appeared in the *Federal*

Register on September 15, 1971 as a proposed regulation. However, this proposal was never finally adopted by OE and therefore was never included in the Code of Federal Regulations.

On March 11, 1975, OE in accordance with directives set forth in the legislative history, proposed that the 30 percent proviso be added to the regulations. The legislative history contains the following statements:

> While it is clearly the expressed objective to serve children in schools with high concentrations, it was never intended by the Act to render any school with a 30 percent concentration ineligible 120/

2. State Legal Framework

Based on the statements in this handbook, at least one state has been allowing districts to use the 30 percent option even though such an option does not exist.

120/ House Report No. 93-805,[1974] U.S. Code Cong. and Adm. News 4108.

In a second state, the SEA allowed LEAs to use the 30 percent rule for approximately one year but stated, in an April 4, 1972 memorandum to LEAs, that it would no longer approve applications in which the 30 percent rule was employed because the proposed rule was not finally adopted by OE.

On March 11, 1975, OE once again proposed the same 30 percent rule for determining school attendance area eligibility. It appears that only one state has modified its application to make express reference to the 30 percent rule as set forth in the proposed regulations.

3. Policy Analysis and Recommendations

The effect of the 30 percent proviso is to increase the number of school attendance areas which may be deemed eligible under the federal legal framework. As explained, supra., the OE proposal is in response to a clear Congressional intent not to prohibit a poor district from targeting such schools.

The question remains as to the meaning of this provision with respect to the targeting requirements, especially the "no-skip provision". For a discussion of this question, see infra. at p. 196.

G. Separate Rankings For Grade Spans

1. Federal Legal Framework

In 1972, a state requested clarification from OE concerning the following issue: "Does paragraph 116.17(d) of the regulations permit selection of eligible target areas based on: (a) one district-wide average, or (b) a district-wide average for each of the three recognized categories for schools...".

OE responded by stating that the LEA, at its discretion, could use either procedure. This conclusion is based on Section 1, paragraph 5 of Program Guide No. 44, rather than on any specific language in the published regulations. Section 1 reads, in relevant part,

> Elementary and secondary school attendance areas in the same school district may be ranked separately on the basis of the percentage or numerical concentrations of children from low-income families among the children eligible to attend such schools.

OE then proceeded to explain why a school district would want to take advantage of a particular option.

> If state priorities emphasize programs for early childhood education, the use of alternative (a) above would provide the local a greater opportunity to implement the state's priorities; conversely, alternative (b) above would provide the local a greater opportunity to implement the state's priorities if those priorities in-

> cluded compensatory education for eligible children in elementary, junior or senior high schools.

The above conclusions expressed by OE are based on a series of unspoken premises. Set forth below is a brief explanation of the statements set forth in OE responses.

In a typical school district, the elementary schools are substantially smaller than the junior or senior high schools. For purposes of this explanation assume there are ten elementary schools each serving 200 children. In 5 of the 10 elementary schools, there are 100 children from low-income families. In the remaining 5 elementary schools, there are no low-income children. The school district has two junior high schools, each serving 1,000 students, there are 300 low-income children attending each junior high school. There is one senior high school serving 2,000 children, of whom 600 are from low-income families.

The district-wide average is 37 percent. Using the percentage method, only those schools with a 37 percent or higher percentage of children from low-income families are eligible. Since 5 of the elementary schools have 50 percent low-income children, they will qualify. The junior high schools and the high school do not qualify.

In sum, OE's first conclusion is correct if (a) the elementary schools are substantially smaller than the secondary schools and (b) the LEA employs the percentage method.

Employing the same two premises, OE's second conclusion is self-evident. The elementary school average is 50 percent, thus, the five elementary schools are eligible. The junior high average is 30 percent and both junior highs are eligible. Since there is only one high school it is automatically eligible. Thus, the LEA can, at its discretion, target the elementary, junior and senior high school levels.

Of course the first premise is not always true, i.e., several school districts have elementary schools which are comparable in size to the junior and senior high schools. In those school districts, a secondary school might be ranked higher than several elementary schools. The LEA's focus on early childhood education will be thwarted unless it employs a separate ranking and then focuses only on the elementary schools.

Furthermore, the second premise need not operate since the federal regulations permit the LEA, at its option, to determine school attendance area eligibility on the basis of numbers of low-income children rather than percentages. To the extent a LEA chooses to rank on the basis of numbers of children from low-income families, the junior and senior high schools would invariably qualify, assuming that the secondary schools are in fact larger than the elementary schools.

This explanation was included for the purpose of laying a foundation for the discussion of the various state interpretations of the provision appearing in Program Guide No. 44 allowing separate rankings.

Before discussing the state policies, one additional reference to federal written materials is required. OE Program Directive L.206.1 (November 20, 1968), formerly entitled Program Guide No. 48 suggests, among other things, that the LEA "may identify priority groupings of children within the chosen attendance areas and thus further focus the program to certain grade levels...".

2. State Legal Framework

It appears that the policy allowing separate rankings for the various grade spans is widely accepted in the States included in the survey. For example, at least six states included in our survey recognize this option in their written materials. Only one state does not appear to permit such a separate ranking except where there is only one school in the district serving all grades. In this situation, the LEA "should concentrate on the specific grade spans with the highest concentrations of low-income children" and target children on the basis of a needs assessment.

Although most of the states recognize the option set forth in the guidelines, the degree of recognition varies from state to state. For example, a review of one state's application instructions would lead one to believe that the grade span option is the sole method for determining school attendance area eligibility. However, it is clear from reviewing the application form and from the interviews that other options are acceptable. A second state, on the other hand, clearly lays out all of the various options in its application. In another state, the application form and instructions indicate that the district-wide option should be employed.

3. Policy Analysis and Recommendations

We recommend that the OE policy set forth in the guidelines, handbooks and correspondence with SEAs and recognizing the option of focusing Title I funds on a particular grade span be expressly included in the federal regulations. The decision as to which grade span to target should be left to the discretion of the LEA (see _infra_. under the program development chapter). Thus, if the LEA choses to focus its Title I funds on the elementary grades, the eligibility and targeting rules apply only with respect to those grades. Under this hypothetical then the "no-skip" provision would apply only with respect to the elementary grades. The high schools, in this case would be totally ignored.

There is only one possible abuse which LEAs may employ under this option whereby they could increase the total number of eligible areas by using grade span groupings in one year and the district-wide criteria the next year. This "loophole" was pointed out to us by one SEA included in our survey. He explained that by using this "flip-flop" approach and utilizing the formerly eligible rule, the LEA could dilute the effectiveness of Title I programs with respect to the schools having the highest concentrations of children from low-income families.

He recommended that once an LEA chose one approach (district-wide v. grade-span), it could not change for at least three years. We recommend that an LEA using the grade span grouping option in one year and the district average for all grades in the subsequent year or vice versa may not target any more children than it would have served if it had not switched standards.

H. Feeder Pattern Concept

A former policy advanced by one state included in our survey, referred to as the "feeder pattern" concept, is of interest. Generally, the policy provided that each unified school district was required to rank their elementary schools according to the percent or number of children from low-income families, following the accepted policy of determining which elementary schools had as high or higher average than the district-wide elementary school average.

In ranking the high schools, the state disregarded the low-income district-wide average concept and replaced it with the concept that "secondary schools in a unified school district shall be ranked on the basis of the number of project participants they receive from K-6 target school attendance areas." The question was raised as to whether this policy was consistent with the federal legal framework.

Subsequent to a 1973 OE review team report questioning this procedure, the state promulgated official regulations which replaced the above quoted guidelines. The present state regulations provide,

> school districts maintaining programs...shall,...give first priority...to elementary students, and then to intermediate and secondary students that received categorical services in feeder preschool and elementary school programs.

In other words, the state no longer determines which high schools are eligible based on which elementary schools conducted programs. Rather, the state would target the children who received assistance while attending elementary schools before targeting another group of children. The question of whether this practice is consistent with the existing Title I regulations concerning the targeting of eligible children will be discussed infra.

In sum, the state has modified its policy. It is interesting to note that nowhere in the communications we received between OE and the SEA was there a mention of OE Program Directive L 206.1 (November 20, 1968), formerly entitled Program Guide No. 48, wherein OE makes reference to its own form of "feeder pattern" concept. This guideline provides, in relevant part, that once the school district has determined which school attendance areas are eligible, that,

> an applicant could develop a model which would focus the program on (a) a "sub-system" (e.g. a high school with its feeder junior high and elementary schools with a program involving children from preschool through the high school level;...

Thus, although the operational base for OE's and the SEA's statement of the feeder pattern policy are clearly different, the basic notion of providing for continuity of services is similar. The OE approach permits the use of the feeder pattern concept only in those areas which are otherwise deemed to be eligible school attendance areas pursuant to the general rules set forth in the regulations. On the other hand, the SEA would allow the LEA to designate an area as a "project area" even if the average number of children from low-income families were not as high as the district-wide average.

For an analysis of the feeder pattern concept, see infra. at page 192 under "Justifications for Skipping".

III. The Selection and Proper Use of Data Sources For Determining Eligibility of School Attendance Areas

A. Introduction

The first step in designing a Title I program is to determine which school attendance areas are eligible for participation in the program. This requirement is generally set forth in the statute and clearly and objectively defined in the regulations (see supra.). However, the Title I statute and the existing regulations issued by OE contain no guidance regarding the data sources LEAs must employ and how LEAs should use such sources in determining the concentrations of children from low-income families. The regulations indicate simply that the computations are based on estimates. However, clear statements of OE policy regarding the above subject are contained in several program directives: Program Directive L 203.1, Section 1,(March 18, 1968), formerly Program Guide No. 44; Program Instruction L 205.1 (May 15, 1972); and two OE handbooks (Title I, ESEA Selecting Target Areas; Title I: ESEA: How It Works - A Guide for Parents and Parent Advisory Councils).

The following discussion will identify several important aspects regarding the use of appropriate data sources, including a discussion of (a) what constitutes an acceptable data source, (b) the use of specific data sources (primary v. secondary sources), (c) weighting the various data sources, (d) how to use the data sources, (e) conducting an annual low-income survey, (f) problems relating to the use and availability of particular data sources, and (g) whether Title I funds may be used to pay for the low-income survey.

B. The Concept Of A Minimally Acceptable Data Source

1. Federal Legal Framework

It is OE's policy to allow LEAs to employ the "best available" data source in conducting a low-income survey.

The HEW Audit Agency, in a draft document entitled Audit Guide For Review of Local Educational Agency Programs for Educationally Deprived Children Title I of the Elementary and Secondary Act of 1965 (January 12, 1973), adds that the data must be timely, complete, and take into consideration known shifts in school populations (p. 15).

2. State Legal Framework

Set forth below are several state interpretations of the OE policy. One state in its application instructions provides that "any reasonable method of criteria [is acceptable] so long as...the data...can easily be documented for audit purposes. For example, if the "free lunch" form or criteria is used, then it would be both proper and wise for the school principal to keep on file a copy of such form signed by the eligible parent."

A second state, in addition to the requirement that surveys must be based on data that can be documented, provides that "a survey which is based only on the opinions or estimates of teachers or principals cannot be documented and is therefore not acceptable."

C. Primary and Secondary Data Sources and Weighing the Various Sources

1. Federal Legal Framework

As stated supra., the law and the regulations do not require that LEAs use any particular source of data on the incidence of poverty in school attendance areas to determine the eligibility of such areas for Title I programs. Suggested sources of information for determining the number of children from low-income families residing in school attendance areas are listed in the OE handbooks referenced above at page 167.

These handbooks suggest the use of primary and/or secondary sources. Primary sources include census data and the number of families with dependent children receiving AFDC payments under Title IV of the Social Security Act. Secondary sources suggested include school lunch data, housing crowding statistics, health statistics, or employment statistics.

According to the OE handbook - Title I - How It Works, if more than one data source is used, a school official must evaluate the importance and reliability of each data source and give it a weight. "Usually census and/or AFDC data will be given the greatest weight" (p. 61), the handbook contains the following example:

> In a district which has had a sudden growth in the number of low-income families since the last census, the weights might be: census - 40 percent; AFDC - 40 percent; and free lunch - 20 percent.

2. State Legal Framework

In a memorandum to all LEA Title I Directors, one state surveyed clarified the OE's policy statements concerning the weighting of various sources appearing in the handbooks because the statements "appear to be inadequate" and because the SEA feels that it is necessary to make the "Title I application as clear and complete as possible so that parents and other citizens may determine for themselves that services are distributed equitably...".

The memorandum explains that if one source is used, no explanation concerning weighting is required. If the LEA uses more than one source, the SEA illustrates the type of explanations that would be required.

An acceptable data source included in this state's materials is a parent survey. However, if this method is used, "it should be used in conjunction with census or AFDC data to be sure they reflect the adequate number of poor children" (memo on data sources). This state also explains that it does not permit LEAs to use e.g., housing crowding data, or health and employment statistics because of their lack of reliability.

In several states school lunch is the primary data source. In one state, an LEA must request an exemption in order to use AFDC[121/] or census data.

[121/] For a discussion concerning the difficulties of obtaining AFDC statistics from social service agencies, see infra. at p. 174.

> Free and reduced priced lunch
> data are the basic source for
> target school selection.
> Districts which have 1970
> census and AFDC counts by
> school attendance areas can
> request an exemption from
> using free and reduced price
> lunch data.

In one state, the SEA supplies local school districts with AFDC data and census track data. For the 1976-1977 school year, the SEA will prepare the low-income survey for each LEA based on AFDC data. However, LEAs are free to use other sources in addition to or instead of such sources. In another state, if secondary sources are used, the application must contain a detailed description of these data and the LEA must be able to show that such source "has a high correlation with primary source data."

D. Uniform Use of Data Sources

1. Federal Legal Framework

The federal materials (Program Guide No. 44, Targeting handbook, Title I: How It Works) provide that "whatever data are used must be used uniformly throughout an applicant's district". Furthermore, the federal guidelines (Program Guide No. 44, Section 1) provide that in determining school attendance area eligibility, "it is not necessary for the LEA to use a particular income level...but the same level should be used for all attendance areas".

2. State Legal Framework

One state clarifies the above federal policy by adding that: "It is essential that data collection be consistent, in all areas of the district. You must not use one source of data for one attendance area and a different source for another attendance area."

In one state, the LEA has established $4,250 as the basic cut-off figure for purposes of the low-income survey. However, all children who are eligible for free school lunches may automatically be counted as children from low-income families.

E. Low-Income Survey Conducted Annually

In all of the states included in the survey, the SEA Title I Director required that each LEA conduct an annual survey of the number of children from low-income families residing in each school attendance areas for purposes of determining eligibility. This survey is generally undertaken in the spring. An LEA in one state we visited raised a question concerning the need for conducting such a survey on an annual basis in light of the so-called "formerly eligible" provisions, added to the Title I statute by the Education Amendments of 1974 (P.L. 93-380).

The "formerly eligible" provision generally provides that project area will continue to be eligible to be designated as a project area for at least two additional years. The LEA contended that since it can target a formerly eligible school in the subsequent year, without regard to its present ranking, it should not be necessary to undertake the expense of conducting the low-income survey for that year. The SEA rejected this contention.

F. Problems Concerning Data Sources (Obtaining AFDC Data)

In general, the SEAs in the various states expressed some concern with respect to the burden the annual survey placed on some LEAs, but the SEAs did not feel that the burden was overwhelming. The states recognize that the LEAs are only expected to estimate the numbers of low-income families recognizing that no single data source will be completely satisfactory.

One problem which was identified by the SEA included in the survey concerned the accessibility of AFDC data to the school districts. In one state, the SEA was informed by its Attorney General that gaining access to AFDC data would violate federal confidentiality requirements. A second state interpreted such a practice in a similar fashion.

It is interesting to note that these problems have continued to occur despite OE Program Instruction No. L 205.1 (May 15, 1972). This instruction suggests a procedure to receive the required AFDC data in a timely fashion and includes a memorandum from the Acting Commissioner, Assistance Payments Administration, HEW which explains how the required information can be disseminated to LEAs without violating the confidentiality provisions set forth in 45 C.F.R. §205.50. This memorandum provides, in part, that:

> The Office of Education is aware of the policies on confidentiality and has given assurance that local educational agencies need only the numbers of AFDC children residing in the school areas, not names, addresses nor other identifying information.

G. Use of Title I Funds to Conduct Low-Income Survey

The program instruction L 205.1 (see above) also includes a paragraph in the welfare official's memorandum which states that:

> The Office of Education has informed us that expenses involved in compiling and providing the data needed is a legitimate expense of Title I....

In spite of this statement, it appears that several states will not allow the expenses associated with conducting the low-income survey to be charged to Title I. The rationale advanced by the Title I Director in one such state was that nothing district-wide could be Title I funded.

H. Policy Analysis and Recommendations

The existing federal regulations contain no guidance regarding the methods and suitability of data sources used to determine school attendance area eligibility. Presently, the federal guidelines referenced above are set forth in the OE Program Directives and OE handbooks. Since these guidelines will be superseded by the publication of final regulations (see supra.), it is important to incorporate these requirements and other requirements added by SEAs into the officially promulgated federal regulations. We recommend that the following minimum standards be included in the federal regulations.

In general, the LEA should use any reasonable method of data collection for purposes of determining school attendance area eligibility. The regulations should include minimum standards for determining what constitutes a "reasonable method".

The first minimum standard should concern the data source. The purpose of establishing such a standard is to ensure the accuracy and reliability of the data. The LEA should use the best available data, i.e., data which is timely, complete, and takes into consideration known shifts in school populations. Generally, the LEA should use primary data sources. However, secondary data sources may also be considered the "best available data".

In addition to the above standard concerning the data source, the following minimum standards should be included in the federal regulations, regardless of the data source used:

> (1) The number of children counted must include all children of low-income families who are of the appropriate age, including children attending private schools and children who have dropped out of school to ensure that an accurate and complete count is undertaken.

(2) The LEA must use the same data source(s) in each school attendance area in the district to ensure uniformity.

(3) The LEA must use the same definition of "low-income" for each school attendance area in the district to ensure uniformity.

(4) The low-income survey must be conducted annually to enable formerly ineligible areas to qualify.

(5) The low-income survey must be conducted in the spring semester, unless local circumstances require an alternative time for purposes of designing programs for the subsequent year. If an alternative time is chosen, the LEA must explain in its application the reason for choosing the alternative time. An acceptable reason might include the fact that the school population consists of migratory workers who traditionally populate the schools in the fall semester. In such a case, the fall semester data would constitute the best available data.

(6) The data must be easily documented for audit purposes. A survey which is based, for example, only on the opinions or estimates of teachers or principals is not acceptable because the data cannot be documented for audit purposes. Similarly, if an LEA uses free lunch data, the estimates by principals and teachers of children who are eligible, but did not apply, can not be included because these opinions cannot be documented for audit purposes.

(7) The LEA must maintain on file at a central location, the records showing the incidences of poverty in all school attendance areas in the district and the worksheets used for computing the statistics for purposes of verification.

(8) To the extent the LEA uses more than one data source, it might weigh the various sources. Usually, the primary sources will be given greater weight than the secondary sources.

(9) Title I funds may be used for the low-income survey to the extent that such a survey is not ordinarily provided with state and local funds pursuant to state law or school board policy.

A final comment regarding the use of AFDC data is required. As noted supra., in some states AFDC data serves as the primary data source for determining Title I school attendance area eligibility. However, in other states, LEAs find it impossible, or in the opinion of the Attorney General in one state, illegal, to obtain needed information from the welfare agencies.

Although OE has already attempted to clarify this situation in the form of Program Instruction L 205.1 (May 15, 1972), obviously this initiative has not proved satisfactory. We would recommend that a second initiative be undertaken at the national level, including statutory amendments to the welfare legislation or modifications of the regulations promulgated pursuant thereto, if necessary.

IV. Standards for Targeting School Attendance Areas

A. Introduction

The Title I legislation provides that payments under Title I may be used for programs and projects "which are of sufficient size, scope, and quality to give reasonable promise of substantial progress" toward meeting the needs of educationally deprived children in school attendance areas having high concentration of children from low-income families.

In school districts in which it is not possible to comply with the above statutory requirement and at the same time serve children in all eligible attendance areas, it has been necessary to develop standards for selecting from among the eligible school attendance areas, those areas whose children are to receive Title I services. This concept is known as targeting school attendance areas. This section of the paper will analyze the general concept of limiting the number of eligible school attendance areas which will be deemed project areas, and the "no-skip" concept.

B. The Concept of Limiting the Number of Eligible School Attendance Areas Deemed Project Areas

1. Introduction

The concept of limiting the number of eligible school attendance areas deemed project areas (targeting school attendance areas) was developed by OE for the purpose of implementing the statutory provision that Title I programs be of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting the multiple needs of educationally deprived children (Section 141(a)(1)(B) of Title I). It should be noted that OE has also developed an alternative stategy for complying with this statutory provision. This stategy is to concentrate the number of projects by limiting the number of eligible students receiving services at each school. The following discussion concerns the application of the first strategy. The second strategy is described infra. under targeting children.

2. Federal Legal Framework

The Title I regulations provide that applications for grants "are to be concentrated on a limited number of projects and applied to a limited number of educationally deprived children. (45 C.F.R. §116.18(e)(1974)). They do not specify that this must be accomplished by limiting the number of project areas.

However, Program Guide No. 44 and Program Guide No. 48 contain policy statements explaining why and how an LEA should limit the number of eligible attendance areas which are deemed to be project areas. Program Guide No. 48

provides that:

> Many Title I programs are based on the selection of individual children from many grade levels from all of the attendance areas which are technically eligible to be included in the Title I program. This approach has usually resulted in programs which are not as effective as they might be. The evaluation reports we have examined indicate that Title I programs, if they are to be effective, must be designed to meet the multiple needs of individual children.

Program Guide No. 44, Section 4.6, includes the policy underlying the so-called no-skip provision, which will be described below. In addition, it provides that:

> the program in the areas with the highest incidence should be designed to serve a larger proportion of children and to provide them with a greater variety of services than programs in areas with lesser incidences of poverty. (emphasis added)

3. State Legal Framework

In several of the states included in the survey the Title I Directors explained that in a large proportion of the LEAs, all of the eligible school attendance areas are in fact deemed project areas. The general explanation offered was that the political pressures by parents, school board officials, principals, etc. are tremendous in terms of limiting the number of schools to receive funding.

To comply with the regulation quoted above that grants are to be concentrated on a "limited number of projects" the SEA interpreted this requirement to mean that a limited number of children in each eligible school will receive Title I services.

In sum, most of the states allow or encourage LEAs to serve all eligible areas. The SEAs explain that LEAs satisfy the concentration requirements by limiting the number of children to be served in each school to those who have the greatest need for assistance rather than limiting the number of eligible areas whose children would receive Title I services.

In one state, the application instructions express a state orientation toward serving all eligible attendance areas. The targeting concept is presented as the exception rather than the rule.

> The district is not required to serve every eligible Title I school. The district may concentrate its efforts in a number of its high priority schools if it appears that this will result in a more successful program.

It appears that the school attendance area targeting strategy is encouraged in at least two states. For a detailed explanation of why, in the opinion of this project, one of these SEAs pursues the school attendance area concept, see *infra*. under "Targeting Children"

4. Policy Analysis and Recommendation

To the extent an LEA targets a limited number of grades within a project area or targets a limited number of children in a project area, regardless of grade span, the LEA may be complying with the concept that such funds be concentrated on a limited number of projects and a limited number of children. However, it is questionable whether the LEA would be in compliance with the general requirement that programs be of sufficient size, scope, and quality, unless the targeted children are provided with services to meet their *multiple needs*, especially with respect to those children who are not only furthest behind grade level, but who are also from families who are the most *economically* disadvantaged i.e., areas having the highest concentrations of low-income families.

Thus, we recommend that the regulations be amended by adding a section which would contain standards respecting the situation where a LEA is considering selecting all eligible areas as target areas. To the extent an LEA choses to select all eligible areas as project areas, the LEA must explain in its application:

> (1) Why it chose to select all eligible areas as project areas rather than following the policy of limiting the number of project areas pursuant to the no-skip provision of the targeting requirement;
>
> (2) How the LEA will comply with the requirement that Title I funds will be concentrated on a limited number of projects and applied to a limited number of educationally deprived children;
>
> (3) How the LEA will comply with the requirement that the project in each eligible area must be of sufficient size, scope, and quality as to give reasonable promise of substantial progress towards meeting the needs of educationally deprived children; and
>
> (4) How the LEA will provide a sufficient variety and intensity of services to meet the multiple needs of children who are not only educationally deprived, but who come from families which are the most economically deprived.

The effect of this clarification is to recognize the practice or policy of selecting all eligible areas as project areas, but explain that the LEA in designing a program for all eligible areas must satisfy certain requirements. The fourth condition set forth above maintains the underlying rationale for the no-skip concept, i.e., those children who reside in the poorest areas will most likely be the furthest behind in grade level and, in addition, need a greater variety of services to reduce their gap or permit them from falling further behind.

C. The No-Skip Concept

1. Overview of Federal Legal Framework

To implement the school attendance area targeting concept, Program Guide No. 44, Section 4.6 provides that:

> the applicant should make sure that the needs of children in eligible areas with the highest incidence of poverty have been met before considering the needs of children in eligible areas in which the incidence is much lower. (emphasis added)

The concept announced in this guideline has been called the "no-skip" since an LEA would not designate an eligible school attendance area as a project area unless all attendance areas with a higher percentage or number of children from low-income families have been designated as project areas.

The sole basis for the no-skip concept is the Program Guide No. 44 reference in spite of the statement appearing in the OE handbook, Title I, ESEA: Selecting Target Areas that "in most cases, no eligible attendance area should be skipped in selecting project aress." This statement was intended to summarize a federal regulation which allegedly appears in the Code of Federal Regulations as a finally adopted regulation. The proposed regulation reads as follows:

> Except upon specific request to and approval by the State educational agency, based on an assessment of particular educational needs, a local educational agency shall not designate an attendance area as a project area *unless all attendance areas with a higher percentage or number of children* (depending on the method used to determine the eligibility of the school attendance area) *have been so designated*. In no event, however, shall the State educational agency approve such a request without first determining that the services provided with State and local funds in any area with a higher percentage or number of children but not designated for a project are comparable to the services in other areas not designated for projects. (emphasis added)

As was discussed above in the case of the handbook's summary of the 30 percent rule, the "no skip" provision as it appears in the handbook is based on a *proposed regulation, which was never made final*.

It should be noted that OE has once again proposed that the "no-skip" provision be included in the Title I regulations. (§116a.20(c), 40 FR 11481 (March 11, 1975)). The recent proposal is substantially similar to the proposal cited above.

2. Justifications For Skipping

a. Federal Legal Framework--The existing guidelines do not explain the circumstances under which an LEA may skip a higher ranked school. However, the proposed regulations contain several exceptions to the general rule. First, an LEA can "skip" if a lower ranked school has a substantially higher incidence of educational deprivation. Specifically, the proposal provides:

> A local educational agency is not required, however, to designate an area as a project area on the basis of its rank, if such agency can demonstrate, to the satisfaction of the state educational agency, that the incidence and severity of educational deprivation in that area is substantially less than in other attendance areas proposed to be designated for projects.

Under the circumstances described above, the OE proposal explains that such a skipped school must not be included in the non-project area average for purposes of computing comparability and the LEA must in fact demonstrate that the skipped school is comparable to the non-project area school average. The reason for this provision is explained infra. in the chapter concerning "comparability".

Second, the OE proposal explains that if an LEA targets a higher ranked school with state and local compensatory education funds, the LEA may skip that school. Under this exception the LEA may include the skipped school in the non-project area school average. For an analysis of this policy, see infra. in the "Comparability" Chapter.

b. State Legal Framework--In those states included in the survey which have adopted the no-skip provision, provisions are made for "skipping" eligible school attendance areas which have higher incidences of poverty so long as a justification is provided in the application.

Typical justifications accepted by SEA include skipping high schools if the LEA's orientation is on early childhood education (see below); where services are offered under the Emergency School Assistance Act funds (ESAA); where a formerly high ranking school drops down to a lower ranking; where state compensatory education funds are sufficient to serve eligible students; and where the teachers at a higher ranked school are unable to design an effective program.

In addition, most states included in the survey would permit an LEA to skip a school based on a comprehensive needs assessment. The project did not inquire as to what would constitute a sufficient showing that the needs of children at a lower ranked school were greater than those at a higher ranked school.

Earlier in the paper, we explained that a large number of the states included in the survey either allow or encourage the separate ranking of elementary and secondary schools. In the states, to the extent an LEA pursues e.g., a policy of focusing on early childhood education, the question remains as to whether the states and the LEAs may ignore or "skip" all of the eligible schools included in the separate ranking for secondary schools.

In at least one state which does not appear to allow separate rankings, the SEA permits the LEA to skip a high school which is higher ranked, if the LEA has an orientation toward early childhood education.

In at least one of the states included in the survey, the state requires that the LEA target all eligible elementary school attendance areas before selecting any secondary school. The state's officially promulgated regulation provided:

> ESEA Title I funds must be allocated to schools which serve concentrations of low-income students. Schools must be ranked from the highest..to the lowest. In all cases when...funds are insufficient to serve all eligible children, the youngest eligible children shall be the first served.

3. Policy Analysis and Recommendation

a. Introduction--Under the existing legal framework, there are no stated justifications for skipping over ranked schools. However, proposed regulations (§116a.20(c)(2), 40, F.R. 11481)) provide two justifications (see supra.).

Set forth below are the project's recommendations respecting modifications to the proposed rule.

b. ESAA Funding--The existence of ESAA monies in a higher ranked school should be a legitimate justification for skipping since the main thrust of the act as interpreted by many of the SEAs we interviewed, is to fund programs which are comparable to Title I in terms of design.

However, before OE adopts such a proposal it should consider the significance of the fact that under the ESAA scheme the monies flow directly from the Assistant Secretary to the LEAs, by-passing the SEA. Thus, the SEAs have no approval, monitoring, and enforcement responsibilities.

c. Existence of State Compensatory Education Funds--Pursuant to the proposed regulations, we recommend that a school receiving state and local compensatory education funds may be skipped. However, as explained infra. in the chapter concerning comparability, we recommend that if an LEA desires to skip a school for this reason that such a school should not be included in the non-project area average and the LEA must demonstrate that such a school is comparable to the non-project area average. This proposal already applies with respect to higher ranked schools skipped because they have a substantially lower incidence of educational deprivation than the lower ranked schools.

d. Feeder Pattern--We recommend that a modified version of the feeder pattern concept also be considered an acceptable justification. Where a school district selects eligible school attendance areas, elementary as well as secondary based on acceptable procedures using low-income data, an LEA, at its option, should then be able to target eligible secondary project area schools according to the number or percentage of elementary age children who were in Title I programs. In other words, so long as a high school attendance area satisfies the school attendance area eligibility requirements, the LEA should be permitted to rank its high schools based on the number of children who were in elementary Title I programs rather than based on the number of low-income children.

e. Inadequate Program Design By Teachers--The justification that a school may be skipped because the teachers of a particular school are unable to develop or implement an effective compensatory program should not be acceptable. The children who would have received services but for teacher's failings, should not be penalized. The school district would appear to have an obligation to hire competent and qualified staff who are capable of designing high quality programs.

f. Higher Incidence of Educational Disadvantagement--We recommend that the provision in the proposed regulations permitting the targeting of lower ranked schools (using economic criteria) which have a substantially higher incidence of educational deprivation than higher ranked schools be adopted. This provision preserves the focus of Title I on meeting the needs of educationally deprived children in areas having the highest concentrations of children from low-income families while at the same time allowing, where appropriate, the targeting of lower ranked schools where the relationship between low-income and educational deprivation does not hold.

g. The Formerly Eligible Rule--According to the legislative history that accompanies the 1974 amendments to Title I, the object of the provision is to ensure a minimum level of continuity for programs already operating and a degree of stability for LEAs in program planning. The provision was adopted "...in response to pleas from educators...that the present law and regulations frequently result in new listings of participant schools every year. This type of constant shifting among schools is bound to be disruptive of any sound educational program." (House Report No. 93-805, 3 U.S. Code Cong. and Adm. News, 4108 (1974)). "The conferees intend, by this amendment, to bring stability to local Title I programs by preventing funds from shifting away from a designated target school before a three year period has elapsed." (S. Rpt. No.

93-1026 at p. 144).

Based on a reading of this legislative history, OE in its March 11, 1975 proposed regulations added to the statute language the requirement that a school attendance area must not only have been formerly eligible but actually designated as a project area i.e., actually received services.

We recommend that the ambiguities inherent in the existing statute be rectified by adding the underlined phrase set forth below.

> ...where such an area does not meet the requirement of that section, but did meet the appropriate requirement and was designated a project area in either of the two preceding fiscal years... . (Section 141(a)(13) of Title I)

The second area of potential confusion concerns whether the "formerly eligible" provision serves as an exemption to the targeting (no-skip) provisions in addition to the eligibility provisions. It would appear from the legislative history set forth above that the "formerly eligible" provision was intended to be an exemption not only to the eligibility requirements but also to the targeting, no-skip requirements. In other words, once a school attendance area is eligible by virtue of this provision, it is also entitled, at the option of the LEA, to continue to participate in the Title I program even though it is not considered to be among those areas with the highest incidence of poverty.

h. The 30 Percent Rule--Recall that the 30 percent rule appeared in the proposed regulations (see supra.). The rule generally provides that even if a school district has a district-wide low-income average above 30 percent, the LEA may deem eligible any area which has a 30 percent or more incidence of poverty. There is no indication in the legislative history that an area at the 30 percent level should be given priority over the areas having higher concentrations of children from low-income families. Thus, we recommend that an area which is eligible solely on the basis of the 30 percent rule cannot be targeted before the LEA targets a higher ranked school.

In other words, a higher ranked school may not be skipped by a school solely on the basis that the lower ranked school qualified for eligibility pursuant to the 30 percent rule.

i. Grade Span Groupings--For a discussion of this issue, see supra. at p. 157.

V. The Operations of School Attendance Area Eligibility, Targeting and Other Requirements In Desegregated School Districts

A. Introduction

Because a large number of school districts throughout the country have or are in the process of undergoing desegregation, the Legal Standards Project investigated the effect of desegregation on the operation of the Title I legal framework. This section of the paper will focus primarily on the effects of desegregation on the operation of the school attendance area selection requirements. In addition, we will outline some of the additional issues relating to other LEA Title I program requirements as identified to us by SEAs and LEAs included in our survey. However, before proceeding with this analysis, it is important to explain the present federal legal framework as it relates to desegregation.

B. Federal Legal Framework

To begin with, the Title I statute and the federal regulations make no specific reference to the operation of Title I programs and projects in schools which have or are undergoing desegregation. Therefore, it is assumed that these requirements as set forth in the statute and regulations apply equally to school districts, regardless of their status respecting desegregation. OE's official policy statements are set forth in Program Guide No. 44 and Program Guide No. 64. These policies are further explained in an OE handbook entitled, Title I: How It Works and a program support package entitled Title I and Desegregation.

Before we describe the existing federal legal framework with respect to school districts undergoing desegregation, it is important to consider the history of the relevant program directives.

From about 1965-1969, most school systems in the South desegregated by "freedom of choice" methods. Overlapping attendance areas based on race were maintained but individual school children could elect to attend schools outside their zones. Since there were no fixed attendance areas, black children who had received Title I services in all-black schools were penalized if they chose to attend white schools which did not have Title I programs. During this period of time, a prior USOE ruling in Program Guide No. 28 permitted Title I programs to "follow the child" in freedom-of-choice desegregation plans. Guide No. 28 was cancelled in 1971 by Guide No. 64, which specifically disapproved the practice for the future:

> Unfortunately, in some instances children who have participated in Title I programs under previous determinations of eligibility, including children who have been served on the basis that Title I services "follow the child", will now be residing in ineligible attendance areas and, therefore, will be ineligible for Title I services.

The basic premise of Program Guide No. 64 is that a child's eligibility to receive services is based on his/her residence in an eligible attendance area which has been designated a project area. Thus, if a child resides in an ineligible or non-project area, he/she is ineligible to receive Title I services regardless of whether he/she had received them before under any previous determination of eligibility.

According to Program Guide No. 64, the only time when Title I programs may "follow the child" is when children "who reside in eligible attendance areas but by specific arrangements attend schools serving ineligible areas may be considered for participation in the Title I program." The USOE Program Support Package explains that this part of Guide No. 64 is intended to make "provision for majority-minority transfer." which is often an added option for some students under desegregation plans. The determination of which students can qualify for this extention of Title I services still must start with ranking the new attendance areas created bv the desegregation plan.

Based on an analysis of the above documents, the following general federal rules apply regarding the selection of school attendance areas in school districts undergoing desegregation.

First, where area boundaries determine the school a child will attend and the school district has established new and well-defined school attendance areas or zones, the general eligibility rules described supra apply. Under these circumstances, Title I services may be provided to those children who either (a) reside in a school attendance area or zone with a percentage or number of children from low-income families as high as the district-wide average or (b) attend a school in an ineligible area in which the enrollment of children from low-income families is substantially the same as or greater than the proportion of children from low-income families in eligible aras.[122/]

Second, where a child resides in an eligible attendance area but, by "specific arrangements" attends a school serving an area not eligible, regardless of whether such other school qualifies under criterion (b) above, such a child "may be considered for participation in a Title I

[122/] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

program".[123] "No child who lives in a project area and who would otherwise receive Title I services is to be denied such services because of his exercise of a right to enroll in another school." [124]

Third, a school serving an attendance area which has been designated as a project area, but which no longer satisfies the general eligibility requirements may, at the discretion of the LEA, nonetheless remain eligible for at least two additional years.[125] However, a newly established school attendance area cannot utilize the "formerly eligible" provision because by definition it is a new attendance area which formerly did not exist. The provision applies only to formerly eligible school attendance areas.

Fourth, where there are no well-defined attendance areas the LEA must determine which of its schools are eligible for Title I projects on the basis "of the number or percentage of children from low-income families actually attending each school operated by the local educational agency." [126]

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[123] Program Guide No. 64.

[124] Program Guide No. 44, Section 5.5.

[125] See Section 141(a)(13) of Title I (20 U.S.C. 241e(a)(13)).

Fifth, regardless of how school area eligibility is determined in school districts which have undergone desegregation, the OE guidelines provide that in approving a LEA Title I application, the SEA should make sure that "Title I activities or services will be offered at locations where children can best be served.... Any proposed Title I activities (including the construction of school facilities) which, because of location or for other reasons, would in effect prolong the racial, social, or linguistic isolation of the children to be served... should not be approved." [127]

Finally, the guidelines provide that Title I funds may not be used to meet the specific requirements of a desegregation plan. "Nevertheless, the Title I program should have a positive effect on the applicant's desegregation program and should not in any event contribute to the maintenance or renewal of segregation." [128]

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[126] Program Guide No. 44, Section 1.

[127] *Id*. at Section 5.5.

[128] Program Guide No. 64.

C. State Legal Framework Concerning Desegregation

In general, the SEAs included in the survey expressed little or no problems with the operation of the requirements concerning the selection of project areas in school districts undergoing desegregation. The Title I Directors in two states explained that the rules were clear and that the state's use of free school lunch data made the eligibility determinations straight forward. Set forth below is a short case history of how one LEA complied with desegregation orders and the Title I school attendance area eligibility requirements.

Under a proposed desegregation plan, the LEA was contemplating two types of school attendance areas:

(1) Schools that have well-defined attendance areas, comprising the neighborhood school concept, and

(2) Schools attended by students who are bussed from other areas of the city or by students voluntarily coming from other areas into a "freedom-of-choice" plan (open-middle school concept).

Both of these type school attendance areas are recognized in the Program Guidelines and thus the LEA explained that they would have no problem complying with the guidelines for the coming fiscal year. The problems identified by the LEA concerned computation, identification and targeting of school attendance areas in the middle of a school year.

Some of the problems identified by the LEA which would result if the LEA were required to re-determine project areas in the middle of the school year are set forth below.

(1) Impossibility to accurately determine eligibility of schools by "middle school assignment" method until after desegregation has been completed.

(2) Requirement by law to organize and enact duly constituted parents advisory councils before planning projects in newly eligible schools.

(3) Lack of time before end of school year to assess amount of unexpended funds in schools for reallocation to newly eligible schools.

(4) Inability to complete planning, including State Department of Education approval of modified programs at old and new locations before end of school year.

(5) The disassembling of ongoing projects and the planning, as well as setting up of new projects, with concomitant relocation of supplies and equipment would last into the middle of the next semester and thus deprive the larger section of the target population which will not be reassigned of vital remedial services and further deteriorate their achievement level.

(6) Lack of continuity on the part of students in Title I programs would seriously hamper the evaluation process which is a legal requirement by the U.S. Office of Education and the State Department of Education.

(7) The continuation of programs in schools that lose their eligibility or part of their target population is guaranteed by a "grandfathering" clause in P.L. 93-380.

(8) Most of the Title I areas do not coincide with racially identifiable white areas of the city where the bulk of desegregation activities will occur. This policy is in line with a previous policy concerning

"size and scope", which was used to avert large scale changes in Title I services.

In addition to the issues raised by the LEA concerning the implementation of a desegregation order in the middle of the year, other issues were raised. For example, the one school district identified the following problems concerning the program design requirements.

> In accord with desegregation guidelines,...the School District groups youngsters heterogeneously in order not to place children into a tracking system. In this types of grouping procedure Title I children and non-Title I children are assigned to the same classroom. It is our belief that heterogeneous grouping is the appropriate policy to follow.
>
> For instruction purposes, students are grouped by instructional needs as defined by behavior objectives on a continuim. Learning stations are used as a tool for individualizing instruction.
>
> When we follow the above procedure we place the E.S.E.A., Title I instructional aide in the position of helping Title I students and non-Title I students.
>
> For example, the Title I aide works with Title I students primarily, but she also works with non-Title I students who have the same instructional need at the learning stations. At times, the classroom teacher instructs the Title I students while the Title I aide works with non-Title I students at other learning stations.

> If we strictly adhere to the Title I guidelines it would preclude this use of flexible grouping.
>
> Title I instructional materials are purchased and placed in the resource rooms for Title I staff to use for the instructional needs of Title I students. However, these materials may be used by non-Title I students who have a need as long as Title I participants are not deprived of the use of these instructional materials when they need it.
>
> The federal auditors have audited the...School District and have observed the above examples and are interpreting the above examples as general aid.
>
> We wish to apprise you of the quandry in which we are placed by E.S.E.A., Title I federal guidelines and federal desegregation guidelines.

D. State Legal Framework Concerning Integration

In at least one state, the SEA has issued guidelines and officially promulgated regulations concerning the establishment of an integration policy and restrictions against isolating and segregating pupils.

> Isolation and Segregation.
> (a) No program utilizing categorical aid funds shall sanction, perpetuate, or promote the segregation of students on the basif of race, ethnicity, religion, sex, or socioeconomic status.

(b) No program utilizing categorical aid funds shall:

(1) Create special tracks for the educationally disadvantaged,

(2) Establish adjustment, pregrade, or junior grade classes for the educationally disadvantaged, or

(3) Physically isolate children from their classmates on a scheduled daily basis, except in the following instance. Based on the results of a comprehensive diagnostic assessment of student needs, children who are assigned to a regular classroom teacher responsible for their instructional program may be moved to a physical location other than the regular classroom on a temporary basis until the diagnosed need has been alleviated. Such an alternate physical location includes, but is not limited to, a reading laboratory, a mathematics laboratory, a bilingual-bicultural learning center, an intergroup education learning center, a diagnostic clinic, or similar facilities where the specific needs of the student may best be served.

School districts that submit Title I project applications must comply with the integration policy adopted by the State Board of Education, which follows:

The Act provides that compensatory education programs shall not "sanction, perpetuate or promote the racial or ethnic segregation of pupils in the public schools."

The Elementary and Secondary Education Act of 1965 requires that a school district receiving federal compensatory education funds sign an agreement to comply with the Civil Rights Act of 1964. The Civil Rights Act states that no person shall on the grounds of race, color or national origin be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" under any federally funded program.

Compensatory education is not a substitute for the desegregation and integration of the schools. Whenever possible, plans for compensatory education and integration shall be coordinated and implemented at the same time.

The State Board of Education on several occasions has affirmed its policy against de facto segregation and in favor of integrated educational experiences for all children. The Board has declared: "...this challenge to equality of educational opportunity must be met with the full thrust of our legal authority and moral leadership...". The policy statement continued,"... in all areas under our control or subject to our influence, the policy or elimination of existing segregation and curbing any tendency toward its growth must be given serious and thoughtful consideration by all persons involved at all levels...".

The State Board of Education has recognized that segregation is one of the fundamental factors contributing to the educational deprivation of disadvantaged children. In addition to having adopted broad regulations implementing its policy on desegregation and integration, the Board has adopted specific guidelines regarding school integration in the use of compensatory education funds. These guidelines are summarized below:

1. Where concentration of minority disadvantaged children exist within a school system, it is imperative that opportunities for remedying the negative effects of segregation be included in the planning and development of compensatory education programs.

2. A school district's application for Title I funds shall include a statement as to the effect that the proposed project will have, if any, on patterns of segregation in the schools in the district. The district shall, in the statement, explain the extent to which it has addressed the problem of de facto segregation and what actions are proposed to alleviate it.

3. Compensatory education funds may be used to advance school integration in the following ways:

    a. Funds may be used to facilitate preparation for integration when related to services for target area children.

    b. After the integration process has started, Title I funds may follow children to the new schools insofar as these school become eligible in accordance with guidelines sections 1.1.1 and 1.1.2.

c. Funds may be used for planned visitation and exchange programs involving children from the target area.

d. Funds may be used for enrichment experience for Title I pupils in districtwide art exhibits, science fairs, field days, and student government activities.

4. Compensatory education funds may not be used to meet requirements of a specific desegregation plan, whether voluntary or court ordered.

E. Policy Analysis and Recommendations

It is our conclusion that the existing Title I provisions and OE regulations pertaining to the selection of school attendance areas need not be modified, except as noted below, where an LEA has recently or will undergo desegregation commencing in the middle of a school year.

A substantial problem apparently arises when the school district is required to desegregate in the middle of the school year. Although it can be argued that the "formerly eligible" provision added by the 1974 Education Amendments permits the continuation of a program under the circumstances described above, generally it would appear that such is not the case. Set forth below is an explanation of why this provision generally would not be applicable and a recommendation for a statutory amendment.

The "formerly eligible" provision contained in the Title I Act generally provides that a school attendance area which does not meet the school attendance area eligibility requirements but did meet the appropriate requirement in either of the two preceding fiscal years "shall be considered to meet the applicable cirterion for that fiscal year." In orfer for a school attendance area to take advantage of this provision it would appear that at least three conditions must be met. The conditions are:

(1) the school attendance area was previously in existence;

(2) the area was considered "eligible" pursuant to the appropriate rules; and

(3) the school attendance area is still in existence.

Pursuant to a typical desegregation plan, the LEA may be required to establish new attendance areas. For example, two school attendance areas may be merged into one new area (paired). "Island", "satellite", or non-contiguous zoning may be used, which means that some schools may be closed and their former areas divided among the schools. Or, the boundaries of attendance areas may simply be redrawn.

In order to establish these new attendance areas, clearly the old or former attendance areas must be abolished. Thus, the school district undergoing desegregation which employs any of the models described above will not be able to comply with the third conditions, i.e., that the school attendance area remain in existence. Thus, such a school district cannot take advantage of the "formerly eligible" provision.

The project recommends that the Title I statute be amended to permit the LEA, at its option, to continue the programs at their present location for the remainder of the year so as to avoid undue hardships on the LEA.

Although the court's rarely require mid-year desegregation, such orders have been handed down. The problems in planning and implementing a new program have been explained supra. The statutory amendment should be phrased broadly so as to include other mid-year changes resulting from, for example, the destruction of a school because of a natural disaster.

VI. Applications, Monitoring and Recordkeeping Concerning School Attendance Area Eligibility and Targeting

A. Application Forms and Instructions

SEA application forms and instructions provided to LEAs to determine school attendance area eligibility and targeting vary from state to state. For the most part, these variances reflect the differing orientations, emphases, and interpretations of the individual SEAs, rather than inadequacies in the OE regulations.

For example, the application forms and instructions present differing approaches in the selection of data sources used for computing area eligibility. Several states permit the LEAs to select their own sources of data, provided they are adequately documented and uniformly applied. SEA oversight in such states is accomplished through a variety of methods. In one state, the application form must describe the LEA survey procedures; in others, sources must be weighted, and an explanation of both choices and weighting of sources provided in the application form;

and, in a few states, the source(s) of data must merely be indicated on the LEA application form.

However, several states do not permit such flexibility in the LEA selection of data sources. In one state, the SEA considers school lunch data as the "basic source" for area eligibility determinations, and the use of alternate sources is only given SEA sanction after the completing of an additional "Alternate Targeting Data Request Form." A second state supplies LEAs with both AFDC and census data and a yearly ranking of the relative weight to be accorded the two; alternate sources are permitted only if they supply the "best available data." A third state similarly rates AFDC and census data as "primary sources"; other "secondary sources" may be used to "fine tune" eligibility data, but must bear a high correlation to the applicable primary data. Other states require the use of AFDC data and census data, respectively, although additional data sources are not prohibited.

Generally speaking, virtually all the states instruct the LEAs on the need for uniformity in their choice of data sources for eligible areas. Many states require LEAs to indicate the relative weight of their data sources, and a few states require LEAs to go one step further and explain their sources and weightings.

A second area in which state application forms and instructions differ is the method of determining eligibility. Under current law and proposed regulations, there are seven bases for school eligibility: the estimated percentage of low-income children; the estimated number of low-income children; a combination of the estimated number and percentage of low-income children; actual enrollment; formerly eligible rule; the no-wide variance rule and the proposed 30% low-income rule. Nevertheless, many SEA application forms and instructions do not provide the LEAs with an opportunity to capitalize on this full range of options in determining eligibility. Thus, one state application form merely provides for a percentage computation. Many states go further than this, but still limit the LEA application forms to a choice between number and percentage computations.

The three more recent methods of determining eligibility generally go unrecognized both in application forms and instructions. For example, one state requires consultation with the SEA before any method other than numbers or percentages may be used. Several states indicated that enrollment data may be incorporated into the number and percentage figures through the use of school lunch data, but have not made any other allowances in this regard. Only a minority of states provide an opportunity for LEAs to compute eligibility based on either the proposed 30% rule or the formerly eligible provision.

Finally, SEA application forms and instruction also differ dramatically with respect to ranking of schools. In several states, the LEA must rank all schools in the district, eligible as well as ineligible. In other states, only eligible schools need be ranked, but the number of ineligible schools must also be recorded. (In at least one state, the additional recording of the number of ineligible schools was the direct result of OE review).

Similarly, it appears that several states require ranking of all district schools together, regardless of grade span. However, in a few states, both grade span and district-wide computations are required or permitted, while one state ranks schools only within each grade span.

B. Application Review Instrument

The Title I legal framework provides that the SEA is responsible for reviewing LEA applications to insure that they effectively meet Title I requirements. Because LEA school attendance area eligibility and targeting statistics are essential aspects of the Title I requirements, most SEAs have developed formal application checklists for verification and review of the statistics. In many cases, however, these checklists are far from comprehensive, and may involve only one key inquiry, for example:

> Each column has been completely filled in and that the schools have been ranked in the correct order.
>
> Eligible schools listed in rank order_______________.

Other SEA application review forms are slightly more detailed in scope, albeit far from comprehensive. For example, one state's checklist contains the following questions concerning school attendance area eligibility and targeting:

> Are concentrations of low-income children indicated by grade span?
>
> Are all schools, target and non-target, listed?
>
> Is participation limited to schools determined eligible?

Far more detailed and comprehensive is the following state checklist, which makes mathematical and other evaluations as to LEA application content.

Page 1

> 1. Check totals at end of "economic survey" to see if they agree with the totals utilized at top of page two. Validate percentages in column 8.
>
> 2. Check Educational Directory to see if schools listed agree with name and total schools. If not, contact District immediately and clear up problem. NOTE: Each school is assigned a number by the State.

Page 4

> 1. Compare schools listed here with list on page 1 to see if any high incidence schools have been omitted from program participation.

PAGE AND ITEM

2. Compare page 4 of this application with page 4 of last year's application. If there are new target schools this year, a comparability report must accompany the application to show that the new school are comparable.

3. In item (4), be sure district has not listed all grades, but only those to be served by the Title I program.

4. Check figures in items (5) and (8) to see if they are the same and if not, that we have an explanation for the discrepancy.

5. Check to see if non-public fitures (item 7) agree with listings on pages 5 and 6.

Finally, at least one state strengthened its application review process in response to an HEW audit which emphasized the need for "tighter control" to prevent grants to ineligible schools. That state's checklist now contains the comprehensive evaluations listed below. Note that, as the state Title I Director has observed, the list includes "specific checking of all calculations establishing eligible buildings."

☐ 6. Percentages, averages (if applicable), totals all lines and columns - Page 2

☐ 7. All schools correctly marked E, E* or I; grade levels shown - Page 2

☐ 8. Schools properly ranked; serving without skipping - Page 2

☐ 9. Target method O.K.; low income source data and weight - Page 2

☐ 10. Totals colums (3), (4) and (5) - Page 3

☐ 11. Totals unduplicated count O.K. - Concentration (Budget ÷ $234 = ____________ as maximum number) - Page 3

(The inquiries listed are checked to indicate either "satisfactory completion" or "information incorrect or missing.")

C. Monitoring and Recordkeeping

Current federal regulations (45 C.F.R. 100(b) 431) require the SEAs to "constantly monitor "performance of Title I activities with respect to "each function or activity of each grant." Generally speaking, this requirement translates into SEA on site review. In a similar vein, 45 C.F.R. §116.23 permits the SEA to direct LEA recordkeeping which it deems necessary.

State responses to the monitoring mandate have been far from uniform. In contrast, state recordkeeping requirements regarding school attendance area eligibility and targeting are fairly consistent. Nevertheless, the two areas are integrally related.

For the most part, the states require that "adequate documentation" or "worksheets" be kept on file in support of local eligibility and targeting determinations. Further details concerning documentation commonly remain unspecified. However, contrary to this trend, at least one state has set out specific recordkeeping requirements:

> The LEA must have records on file to substantiate the eligibility of each Title I target school. In addition to identifying children by name and address, the records must also show that the income level and identification data used were applied uniformly throughout the district. If more than one data source was used in determining number of low-income children, the weight given to each data source must be indicated on the application form.

LEA documentation and records are the primary focus of the SEA in monitoring school attendance area eligibility and targeting. Despite this focus, few states have detailed and objective monitoring instruments, relying instead on informal procedures and/or general evaluations of "adequacy." At least one state has no questions concerning school eligibility and targeting incorporated into its monitoring instrument.

In another state, the monitoring instrument contains the three general inquiries set forth below. Note that very general conclusions are called for rather than specific details of compliance.

> Data are on file to support the determination of the numbers of economically deprived children by attendance area
>
> Eligible attendance areas are determined in a manner consistent with the regulation
>
> Project areas are determined by using a rationale consistent with the intent of the Act.

And, in a third state the monitoring instrument checks compliance with specific aspects of the federal regulations. Thus, it covers such areas as uniformity of criteria and base for determining eligibility. The relevant questions are as follows:

I. SELECTION OF ATTENDANCE AREAS FOR TITLE I PROJECTS (§116a.20, 45 C.F.R.)

		YES	NO	SEE REMARKS	N/A*
1. Each school in the district surveyed its children concerning economic status.	1.	___	___	___	___
2. The economic survey of all school was conducted using the same criteria for economic deprivation. (EX: school lunch records, welfare records such as AFDC)	2.	___	___	___	___

__________ (Criterion) __________ (# of Schools)

__________ (Criterion) __________ (# of Schools)

		YES	NO	SEE REMARKS	N/A*
3.	All children eligible to attend a given public school were included in the survey. (Should include an estimate of dropouts. Must include children attending non-public schools.) 3.	___	___	___	___
4.	A master list of each school's economically disadvantaged children is in a confidential file. A file is maintained in ( ) each school center, or at the ( ) district office. 4.	___	___	___	___
5.	Schools selected for Title I projects have concentrations of children from low income families which are either the same as or greater than the district's average percentage or the average number; 30 percent or higher; no wide variance; or had a Title I program in either of the two (2) fiscal years immediately preceding, but not earlier than, FY '75. 5.	___	___	___	___
6.	The district has its target schools listed in rank order on the basis of the percentage or number of economically disadvantaged pupils identified in the school. 6.	___	___	___	___

		YES	NO	SEE REMARKS	N/A*
7. The total number of schools (attendance areas) selected as target schools for Title I purposes does not exceed either the total number of schools falling above the district's average percentage of children from low-income families or the total number of schools falling above the district's average number of children from low-income families, unless a school qualifies as a Title I target school in either of the two (2) fiscal years immediately preceding the current fiscal year. Neither of such two (2) preceding fiscal years was either than FY '75.	7.	___	___	___	___
8. If the selection of schools for Title I purposes is based on a combination of criteria as stated in #7 above, the schools with the highest percentage and/or the highest number of children from low-income families are included.	7.	___	___	___	___

D. Policy Analysis and Recommendations

The foregoing discussion of application forms and instructions indicates that, while the SEAs may not actively discourage LEAs from pursuing the full range of eligibility options available under current law and regulations, they often do not encourage the LEAs in this regard. Either purposefully or unintentionally, many SEA application forms and instructions make no mention of the newer eligibility provisions, such as enrollment option and the formerly eligible rule. Although these options may only have applicability in a minority of situations, their underlying purpose is to expand the flexibility and coverage of Title I eligibility. This purpose goes unsupported, and perhaps is defeated, when states omit to include all eligibility options in their application forms and instructions.

For these reasons, we recommend that OE regulations be amended to reflect the full range of eligibility provisions. All methods of determining eligibility should be set out in the SEA application form and explained in the SEA instructions from completion. In this manner, the eligibility provisions of Title I may have their intended scope.

In the area of application review, we recommend that OE promulgate regulations which require review of all mathematical and other LEA calculations of eligibility prior to SEA approval. This change would be in keeping with the practice of several states as well as with recommendations made to individual states following HEW audit. Furthermore, such a formal application review procedure would conform to the general application review responsibility of the SEAs under 45 C.F.R.§116.34(a). Absent comprehensive review of this sort, the SEA cannot give adequate assurances to OE that only eligible schools are receiving Title I grants.

Additionally, we recommend that federal regulations require that LEAs maintain, on file at a central location, the records showing the incidencies of poverty in all attendance areas in the district and the worksheets used for computing the statistics for purposes of verification. SEAs would still be permitted to specify additional record-keeping requirements deemed necessary. Rather than representing a change in LEA practice, this change merely constitutes a formal definition of what constitutes the "adequate documentation" and "worksheets" currently required by most states.

Finally, due to the apparent lack of detailed inquiries into school attendance area eligibility and targeting determinations in SEA monitoring instruments, we recommend that federal regulations be amended to require comprehensive SEA monitoring. The regulations should include reference to the substantive provisions described in the text, including, for example the following checkpoints.

> The State educational agency shall establish monitoring procedures which provide, at a minimum, for the following:
>
> ...as to school attendance area eligibility and targeting:
>
> (i) That economic surveys of all district schools have been made, based on uniform criteria and using the best available data;
>
> (ii) That all children eligible to attend a given school were included in the survey, including children from private schools and dropouts;
>
> (iii) That schools selected for Title I projects have concentrations of children from low-income families which are either the same as or are greater than the district's average percentage and/or average number; enrollment; 30% or higher; no-wide variance; or had a Title I program in either of the two fiscal years immediately preceding;

(iv) That the schools with the highest percentage and/or highest number of children from low-income families are included as target schools, unless excepted for permissible reasons (check reasons).

CHAPTER 3

PROGRAM DEVELOPMENT: FUNDAMENTAL BASES OF, AND RELATIONSHIPS AMONG, TARGETING OF CHILDREN, NEEDS ASSESSMENT, AND PROGRAM DESIGN

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CHAPTER 3

PROGRAM DEVELOPMENT: FUNDAMENTAL BASES OF, AND RELATIONSHIPS AMONG, TARGETING OF CHILDREN, NEEDS ASSESSMENT, AND PROGRAM DESIGN

Targeting of children, program design, and needs assessment are interrelated Title I requirements. Each requires LEAs to take steps which contribute to the process of program development. The interrelationship of these requirements is implicit in one of the basic statutory provisions of Title I, §141(a)(1), which states that Title I funds must be used for "programs and projects . . . which are designed to meet the special educational needs of educationally deprived children." (Emphasis added.)

I. Introduction

A. Definition of Terms

As used in this chapter "program development" refers to the three requirements -- targeting of children, program design, and needs assessment -- taken as a whole. Program development is a process consisting of several steps, each of which stems from one of the three constituent requirements.

"Targeting of children", as we use the phrase, is a two-part decision which determines the children who will participate in a Title I program. The first part is deciding which general groups of children will be considered for participation in the program. General groups means grade spans (e.g., grades K-6), and such groups as handicapped children, dropouts, neglected and delinquent children, educable mentally retarded children, trainable mentally retarded children, bilingual children, etc.

The second part is deciding which of the children falling within a targeted general group will be the actual participants in the program.

"Program design" refers to the decisions which establish the objectives and sub-objectives of a Title I program and determine the program activities and services intended to meet those ends. These decisions include the initial selection of general instructional areas on which the program will focus.

"Needs assessment" refers to the process of empirical discovery and analysis which forms the basis of most (but not all) of the targeting and program design decisions. The needs assessment discovers the children who are educationally deprived and who have the greatest need. It determines the incidence, severity, contributing factors, and relative priority of those children's special educational needs.[129/]

[129/] Under these definitions, needs assessment steps are "discoveries" while program design and targeting steps are "decisions"; needs assessment steps gather information; targeting and program design steps make decisions based, in part, on this information. The discover/decide distinction is not, itself, important; it is just a tool which facilitates presentation of the program development principles which are important. (The distinction, moreover, does not apply absolutely in our own conceptual framework. Determination of the contributing factors and relative priority of needs are needs assessment steps which necessarily include decisional elements, though they are primarily based on empirical "discoveries." For more discussion of the relationship between conceptual frameworks and substantive principles see Section IV, *infra*.)

In discussing the informational bases on which program development decisions should be made and the manner in which targeting, needs assessment, and program design steps should be performed, this chapter employs the terms "empirical evidence," "value preferences," and "educational theory."

Empirical evidence, values, and theory are not terms which can be used in any sharply delineated way without raising fundamental philosophical objections concerning the validity of fact/value distinctions. Nonetheless, in everyday life, common sense-based distinctions between "data" (empirical evidence), "preference" (values), and articulated hypotheses about the nature of reality (theory) are meaningful. These common sense distinctions place empirical evidence, values, and theory at different points on a continuum. While the centers of these concepts are sufficiently distinct to be recognizable, their edges merge into one another and do not form sharp boundaries. (When is a "belief" a "value preference" and when is it a "theory"? When is the reporting of observations "empirical evidence" and when is it simply a "belief"?) The blurred edges of these concepts are, in fact, manifestations of the basic philosophical problems raised if more than common sense meanings are inferred.

None of these problems need detain us, however. While it is not feasible to attempt precise definitions of "empirical evidence," "value preferences," and "educational theory," the common sense distinctions between the central notions of these concepts can, and must, be recognized in analyzing the principles of law and educational policy that are reflected in the Title I legal framework.[130/]

Thus, for our purposes in analyzing the law of Title I, "empirical evidence" refers to such information as: (a) the results of attempts to measure educational need or student achievement; (b) the results of direct observations by teachers of the academic performances or needs of students; and (c) the results of parental observations and experience concerning the needs of their children.

An example of a statement reflecting a value preference might be, "It is more desirable to focus the Title I program on reading and mathematics rather than social studies and biology." An example of a statement reflecting an educational theory might be, "Food services should be provided; many children are improperly nourished with consequent effects on their ability to concentrate on academic pursuits."[131/]

[130/] There is an important consequence of using these concepts in only a general sense, without any attempt to achieve rigorous precision--the concepts are freed of any unusual or restrictive connotations. Empirical evidence is not, in this paper, a "code word" for standardized tests, for example.

[131/] The conclusion that "food services should be provided" is actually reached by the combination of empirical findings (some children are, in fact, improperly nourished, or there is substantial indication that they might be) and educational theory (there is a link between improper nourishment and ability to concentrate on academic work). See the discussion of Step 7, infra.

Thus, in discussing the obligation of LEAs to rely upon empirical evidence in making a particular program development decision, this chapter, consonant with the level of specificity with which existing documents in the Title I legal framework discuss the topic, employs only a general conception of "empirical evidence." Methodological details are properly the subjects of the chapters on needs assessment, targeting of children, and program design. In those chapters, though, the limits of our expertise confine us primarily to identification of the issues which methodology experts must address.

These limitations and caveats, however, do not eliminate the need to discuss the basic, general methodological principles which are embedded in the Title I program development legal framework. Hence, these principles are part of the concern of this chapter.

B. Scope and Rationale of this Chapter

Other chapters of this study discuss the details of targeting of children, needs assessment, and program design; this chapter is confined to three subjects: 1) identification of each of the basic targeting, needs assessment, and program design steps which constitute the program development process; 2) indication of the manner in which the steps are interrelated; and 3) identification of the basic kinds of information or categories of input on which each step must be based.[132]

These subjects embrace some of the most important issues raised by the targeting, needs assessment, and program design requirements. This chapter highlights them so that their significance is not lost among the more detailed issues discussed in other chapters, and so that the context in which the more detailed issues arise is clear.

Our attention was first drawn to the need for a chapter like this -- one providing an overall perspective of the basic elements of program development and their interrelationship -- by a simple observation. State policies on program development are extraordinarily diverse, so diverse, in fact, that it is at times difficult to believe that they all respond to the same federal legal framework.

In investigating, we found that many state policies, in more respects than one, do not in fact respond to the federal legal framework, and that a primary cause of this is that the federal legal framework, on many issues, is discernible only after painstaking analysis of the statute, regulations, program guides, directives, handbooks, technical assistance packets, and OE correspondence. Many states simply do not have all that paper, let alone the inclination to scrutinize it, circling, underlining, referring back and forth.

---

[132] Thus, this chapter is limited to the most rudimentary aspects of targeting, needs assessment, and program design methodologies. Such issues as the analytical rigor with which the needs assessment process must be pursued and the level of detail which must be reached in program design steps are left to the individual chapters on targeting of children, needs assessment, and program design.

One of the most serious consequences of the difficulty in deciphering the federal legal framework has been the perception of some program planners that the law overburdens and unnecessarily restricts the design of programs. In the absence of clear understanding of the law, there has been a tendency for program planners to "assume the worst," the result being reluctant pursuit of policies thought to be required, but not actually required, by the Title I legal provisions. Clarification of the law would eliminate unfounded fears and, thus, promote flexible pursuit of the full range of desirable program design options allowed by law.

Major issues are in need of clarification and many federal standards need to be moved from obscurity to prominence. New regulations should do these things. The essence of ten year's experience needs to be distilled from the multiplicity of federal documents and set forth, simply, in one place.

This chapter undertakes this task. It analyzes the documents of the formal and informal Title I legal framework to uncover the concepts and principles constituting their common thread. It interprets and attempts to resolve uncertainties in the legal framework stemming from semantic inconsistencies, unarticulated implications, incompleteness in any one document, and the relatively rare conceptual inconsistencies between documents which have prevented the federal legal framework from communicating its message clearly to all those who need to hear it.

Our recommendations for new regulations are drawn from the concepts and principles that are either expressly stated or fairly implied in existing federal documents. In our recommendations we have expressed those concepts and principles in consistent terminology and brought them together from disparate sources.

Of course, in expressly stating the unarticulated implications of federal documents and in making choices necessitated by the few conceptual inconsistencies in those documents, we have brought our judgment to bear. Confronted with an unarticulated implication we have formulated an expression of it, based on our judgment of the reasonable extent of the implication. Confronted with a conceptual inconsistency between documents (or within a document) we have passed judgment on the reasonableness of the conflicting approaches and recommended a choice.133/

133/ In making assessments of reasonableness we have not scanned the universe of policy options arguably implied by the broad concept, "compensatory education." For the purpose of our work, reasonableness means compatibility with the basic legal framework and capability of implementation without uncompensated sacrifice of other Title I policies worthy of equal respect. We have not considered what Congress might have done in 1965 as an alternative to enacting Title I. Neither have we considered the world of administrative "might-have-beens." We have made interstitial judgments confined by the reality of current Title I legal principles and policies. Such was our mandate and such are the limits of our expertise.

This assessment of "reasonableness" involves primarily the application of logic and common sense. Recognizing that our assessments are made in the realm of the educator's expertise, however, we have not allowed our judgment even in this limited area of inquiry to remain further unconfined. On the contrary, no implication articulated by us has been extended beyond an articulation which educators responsible for the practical, serious implementation of policy have made. There is a state policy currently in force exceeding or matching the extent of any policy recommendation we have drawn from implications in federal documents.

Where we have chosen between inconsistent conceptualizations we have consulted not only logic and common sense, but, as a secondary source, the weight of opinion manifested by the state policies studied in our survey. Furthermore, as mentioned earlier, where we have found the resources of federal documents, state policies, logic and common sense inadequate for the resolution of a given issue we have made no recommendation at all and have confined our role to identifying the issue as one which must be addressed by others whose expertise exceeds our own.

C. Summaries of Two States' Program Development Processes

The differences among state program development policies extend to fundamental elements of the program development process and the relationship of those elements to each other. The degree of variance can be illustrated by briefly contrasting the policies of two states, State A and State B.

In State A, SEA policy calls for the measurement of educational deprivation in a wide variety of subject areas. Any objective measure of achievement may be used, and LEAs have discretion to determine the score or performance level below which children will be deemed to be educationally deprived. The "objective" measures may include judgments made by teachers (usually thought to be subjective) so long as standards and criteria for making those judgments are specified.

After the educationally deprived children are identified, subject areas for further assessment are identified more specifically and the range of subject areas is expanded to include the affective and psychomotor domains; "factors deemed causal or contributive to educational deprivation" are considered as well. A variety of indicators are used and weighted scores are assigned to each child's performances or assessed characteristics.

The weighted scores of the educationally deprived children are arrayed in a chart. The weighted scores are totaled for each child and then totaled in the other direction for each subject area. The children with the highest totals of scores are deemed to be those having the greatest need for assistance. The priority needs for each individual child appear in the body of the chart. Rough indications of the priority needs of the group are determined by comparing weighted score totals in each subject area. Final determination of priorities for the Title I program is a matter of judgment to be made by parents, staff, administrators, and community representatives (all of whom are also involved in selecting the subject areas for assessment and the criteria for determining weightings).

Priorities are determined by subject and grade span (e.g., reading achievement in the primary grades, attitude toward self in grades four through eight). Focusing toward the top of the list, LEAs then identify a group of priorities that can be combined and addressed efficiently in a single project. Several such groups are identified from the list of priorities. (The first group might consist of priorities 2, 3, 5, and 6; the second group, priorities 1, 4, 7, and 11, etc.) Projects are designed for each group of compatible priorities. Children are then assigned to the project that corresponds most closely to their individual needs.

In State B, standardized tests must be used to identify the children who are not performing up to grade level in mathematics, language arts, and reading. A formula establishes the cut-off score used to identify the educationally deprived children within each of the three subjects. A child performing below 10/12ths of her or his appropriate grade level is deemed to be educationally deprived. (A first-grader performing two months behind grade level as indicated on the test is educationally deprived; so is a second-grader four months behind; a third-grader six months behind, etc.). No further determination of educational deprivation or assessment of needs is required. The subject in which the largest number of children score below the educational deprivation cut-off is the first priority. Second and third priority are similarly determined. The Title I program must address the priorities in the established order, with no skipping. Children are initially selected to participate according to their test scores, though they may be eliminated from consideration if they or their parents object, if they already have a good teacher in the subject in which they are educationally deprived, or if they are disruptive.

State A's program development policy calls for greater specificity, refinement, and detail than does State B's. Generally speaking, State A's policy focuses on children, while State B's focuses on subjects. In State A the neediest are identified according to the totality of their needs, and subjects are prioritized considering the needs of just those who have the greatest need for assistance. In State B the neediest are identified separately within each of the three predetermined subject areas and subjects are prioritized according to a simple head count of the total number below a cut-off score.

In State A, the means and criteria for determining educational deprivation and assessing needs are varied. In State B an LEA may determine educational deprivation and assess needs using a single standardized test and a pre-determined cut-off score. In State A assessment must continue after the educationally deprived are identified. In State B one indicator can be used to simultaneously identify, and determine the needs of, educationally deprived children.

In State A judgment and discretion must be exercized jointly by many people throughout the needs assessment process. In State B the process is mechanical, calls for little discretion, and, hence, could be performed by any individual or individuals able to follow instructions.

D. Overview of Major Issues and Problems

Some of the steps of the program development process are clearly and expressly identified in the current Title I legal framework; others, however, are only implied. Careful analysis of the federal provisions firmly establishes each step, but in the absence of clear regulations expressly and simply setting forth in one place the basic steps which LEAs are required to take in developing their programs some state policies have not been adequate to ensure LEA compliance with fundamental Title I requirements.

In our survey we found states in which selection of program participants by subjective recommendation is the only targeting decision. In these and other states, standards for ensuring selection of those having the greatest need are absent. We found states in which no recognizable needs assessment based on empirical evidence is made, or in which LEA needs assessments consist of one standardized test. In such states systematic assessments in the affective domain and efforts to uncover factors contributing to educational deprivation and need are simply not attempted.

Total omission of steps necessary to the proper development of programs, we found, is frequent -- and this despite the fact that careful analysis of the federal legal provisions does reveal the steps that must be taken.

The current legal framework offers considerably less clarity concerning the interrelationship of program development steps than it does concerning the existence of these steps. In what order should the steps be taken? How should the results of one step affect the performance of another? Some partial answers can be gleaned from federal materials, but many issues are simply not addressed.

The scope of the needs assessment, for example, is an important subject inadequately addressed by the current legal framework. How many subject areas must be included? Can an LEA decide in advance to limit its instructional program to mathematics or must it first discover through empirical inquiry that mathematics is a higher priority than reading and other subjects? How many other subjects?

How many children must be included in the needs assessment? Must an LEA identify each educationally deprived child residing in each targeted attendance area? May an LEA decide in advance to serve only certain grade spans or other identifiable groups, or must an LEA first discover through empirical inquiry that children in the particular grade span or group have the greatest need? What standard could indicate that a twelfth grade student has greater need than a second grade student, or that a non-English speaking student has greater need than a dropout?

Should the needs of all educationally deprived children be assessed, or just the needs of those educationally deprived children having the "greatest need? (greatest deprivation?) Perhaps just the needs of the limited number of children selected to actually participate in the program should be assessed.

If an LEA can make some basic program decisions in advance of an empirical needs assessment, how detailed can those decisions be? If an LEA can decide in advance to limit its instructional program to mathematics in elementary grades, can it decide in advance to teach only fractions to fourth-graders? If at some point in the program development process decisions of this kind must be based on the results of an empirical needs assessment, what is that point?

In the absence of adequate federal guidance concerning these questions (in some cases federal materials offer inconsistent guidance), state policies, we found, range from one undesirable extreme to another (with some thoughtful ones falling in between). We found states in which SEA policies allow LEAs to design their programs in such detail prior to an empirical needs assessment that the needs assessment is rendered irrelevant or is transformed into a hunt for children whose needs happen to coincide with those the pre-packaged program was designed to meet.

We also found that some states, apparently fearful that the federal regulations require absolutely empirical bases for all targeting and program design judgments, have policies on paper[134] which say that all children (from pre-K to dropouts) must have their needs assessed in detail each year, that a vast array of assessment means must be used, that the full spectrum of imaginable needs must be included in the assessment, and that no targeting or program design decisions can be made until this profusion of data is assimilated and weighed -- when, in fact, it is well known that nothing of the sort ever really takes place and no serious attempts to enforce such policies are made.

In the absence of express identification in the current legal framework of each program development step, state policies which condone total omission of one or more steps have been developed.[135]

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[134] Many of these appear to be interpretations of Program Guide No. 44, §2.1, entitled "Comprehensive Assessment of Needs."

[135] Most frequently omitted are needs assessment steps. The findings of the GAO Report in this regard concur with ours. (See pp. 17-19 of the report.)

The failure of the current provisions to clearly interrelate the program development steps, moreover, has resulted in confusion as to which steps should be taken first and the effect of initial steps on the scope and manner of performance of subsequent steps.

A third failure -- the failure of the legal framework to identify the basic kinds of information or categories of input on which each program development step must be based -- has resulted in major discrepancies between the conception of particular steps found in the federal legal framework and the implementation of those steps by some LEAs. In our survey we found states which allow needs to be prioritized according to subjective value preferences, rather than empirical evidence of the incidence and severity of the needs among targeted children. We found states in which prior resource commitments (such as purchase of special equipment or hiring of teachers with a narrow range of expertise) are primary program design considerations while empirical evidence of children's needs is secondary. We found states in which educational theories (lessons from case studies, evaluations, etc.) concerning factors which contribute to educational deprivation, or the most effective types of solution strategies, are systematically ignored in the formulation of program activities and services.

E. Overview of Major Recommendations

New regulations are needed.

To ensure that important program development requirements are not disregarded, new Title I regulations should expressly and simply set forth in one place the basic steps which LEAs must take in developing their Title I programs.

To end the uncertainty and confusion concerning the interrelationship of program development steps new Title I regulations should expressly indicate that 1) the steps of the program development process are, with some exceptions, ordered sequentially (the exceptions concern steps which might be taken simultaneously); and 2) the results of earlier steps are premises for later ones.

To ensure that LEA program development processes are basically congruent with Title I principles new regulations should expressly identify the extent to which each program development step must be based on the following general types of information or categories of input: 1) empirical evidence of children's needs; 2) educational theory concerning either factors contributing to need and educational deprivation or the effectiveness of alternative approaches to addressing needs (including results of educational research and evaluations of past Title I programs); 3) value preferences; and 4) analysis of available resources.

The clarification of the federal legal framework in these respects is not only necessary to clearly communicate to program developers the requirements of federal law, but also to eliminate the basis for misconceptions and fears concerning the burdensomeness of the tasks that must be undertaken. Clarification of the legal framework would remove the basis for apprehension that federal law requires massive, detailed needs assessments encompassing children who will not be served and subject areas that will not be addressed by an LEA's Title I program. It would inform program planners that they are encouraged to exercise discretion and permitted to make judgments concerning critical program development decisions and that they need not offer "proof" to justify each step they take. It would delineate the full range of permissible options open to LEAs in developing programs and foster greater exercise of those options, since there would be no need for program planners to shrink from approaches thought to transgress ill-defined legal limits.

The following paragraphs summarize the points we feel should be explicitly stressed in new Title I regulations.[136]

1. Step 1 -- Decide the general instructional areas -- and
   Step 2 -- Decide the general target groups

The program development process begins with two formal policy decisions. Either may be made first or they may be made concurrently. The first decision is the program design step which determines the general instructional areas -- reading, language arts, mathematics, etc. -- on which an LEA will focus its program. The second decision is the targeting step which identifies the general groups of children -- grade spans, and such groups as handicapped children, dropouts, bilingual children, etc. -- that will be considered for participation in the program.

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[136] This overview of the steps of the program development process does not include notes and references. It introduces and summarizes Part II of this chapter. Part II discusses each program development step in greater detail and includes the federal legal documents which establish each step, place it in the context of other steps, and indicate the manner in which it should be performed.

These two steps are premises for the needs assessment. Children not in the targeted general groups need not be included in the needs assessment. Similarly, the assessment of instructional needs may be limited to the selected general areas. If an LEA decides to provide instructional services only in reading and language arts, no assessment of mathematics needs is necessary. (The targeting of attendance areas, see Chapter 2, may also be a premise for the needs assessment. Children in non-targeted areas need not be included in the assessment.)

The selection of general target groups may be based on the value preferences of the program planners. If they wish, the planners may base their decision on educational theory as to the effectiveness of working with particular groups or grade levels. Or, they may gather empirical evidence and formulate some means of assessing which groups need help most. This is not required, however.

The selection of general instructional areas must reflect emphasis on basic instructional needs, but the selection of particular general instructional areas may be based on value preferences. Again, program planners may implement their own theories concerning the relative priority of general areas or attempt to gather empirical data as to whether, for example, reading is needed more than mathematics; but program planners need not justify their selection of general instructional areas in terms of such data. LEAs may select different general instructional areas for different general target groups (reading in grades 1-3, mathematics in grades 5-7, motor skills for TMR children, etc.). Also, in determining the number of general instructional areas in which to offer Title I services program planners must consider the limitations imposed by resource constraints.

2. Step 3 -- Discover the educationally deprived children -- and Step 4 -- Discover those having the greatest need

Once the general target groups and general instructional areas are chosen, the next step, Step 3, is to discover which of the children in the selected groups are educationally deprived in the general instructional areas. This needs assessment step must be based on empirical evidence which indicates the children whose level of educational attainment in the general instructional areas is below that appropriate for children of their age.

Following, or simultaneous with, Step 3, LEAs must discover which of the educationally deprived children have the greatest need. This needs assessment step, Step 4, must also be based on empirical evidence. The evidence may be the same as that used in Step 3 or additional evidence may be gathered. The determination of those having the greatest need requires only comparison of the educational attainment of children within the same targeted general group. LEAs do not have to "determine," for example, whether an individual seventh grade student has greater need than an individual third grade student. Furthermore, LEAs may identify the children according to greatest need within each general instructional area, or, if the LEA has made a firm decision to offer instructional services to a targeted group in more than one area, the LEA may identify the children according to greatest need as shown by a composite indicator.

3. Step 5 -- Decide the program participants

Steps 3 and 4 are the needs assessment steps which form the basis for the second part of the two-part targeting decision. This targeting decision is, thus, Step 5 of the program development process. In Step 5 LEAs determine which of the children in the targeted general groups will be selected for actual participation in the Title I program.

Step 5 must be based on the policy of selecting first those who have the greatest need, as indicated in Step 4. Resource constraints determine the number of children who may participate because Title I funds must be "concentrated." (See Chapter 7.) Among targeted groups LEAs may allocate funds according to the value preferences of the program planners. Within a targeted group, however, children having the greatest need, as identified in Step 4, must be selected until the funds allocated to the group are exhausted.

Step 5 is a premise for subsequent needs assessment steps. Once the actual program participants have been selected, only they need be included in the more detailed inquiries required by Steps 6 and 7.

4. Step 6 -- Discover needs in the component areas of each general instructional area -- and Step 7 -- Discover other contributing factors

Step 6 of the program development process discovers the incidence and severity of the participating children's needs with respect to each component of the general instructional areas in which they will receive instructional services. (Vocabulary, for example, might be a component of reading.)

Step 6 bears some resemblance to Step 3 -- both are empirical inquiries concerning the academic achievement of children. Step 6, however, must be a more refined and in-depth inquiry, as its purpose is not just to determine who should receive services, but to discover in detail what precise needs must be met.

Step 7, simultaneous with, or perhaps subsequent to Step 6, is an attempt to discover -- as accurately as possible through a process of empirical inquiry and analysis -- other factors contributing to the participating children's educational deprivation and needs. This step reveals the non-instructional needs that must be met and provides insights concerning the activities, services, and strategies that will maximize the likelihood that the program will successfully meet the children's instructional needs. It must be an open, unconfined inquiry which is based on empirical information interpreted in light of educational theory.

5. Step 8 -- Prioritize needs

Once the incidence, severity, and contributing factors of the specific needs of the program participants are determined, LEAs must decide the relative priority of these needs. The empirical evidence gathered and analyzed in Steps 6 and 7 must be the primary basis for this decision. Instructional needs must be ranked according to their severity and incidence. Where the most severe needs are not the most widespread, any rational weighting of the two factors may be used to formulate the priority rankings. Once instructional priorities are established according to empirical evidence of need, the rank list may be modified somewhat according to value preferences or educational theory, but modifications may not be so extensive as to nullify the effect of the empirical input. Non-instructional needs must be ranked according to the perceived importance of their relationship to the instructional needs, not simply their incidence or severity.

6. Step 9 -- Decide the objectives and sub-objectives -- and
   Step 10 -- Decide the activities and services

The prioritization of needs, Step 8, leads directly to the establishment of the objectives and sub-objectives of the Title I program, Step 9. The Title I program must be designed to meet the highest priority needs first.

A general objectives for each general instructional area must be formulated. Sub-objectives for each objective must then be established. The sub-objectives for any one objective must, as a group, span the full scope of the objective in such a way that failure to attain the objective may be directly traced to failure to accomplish one or more of the sub-objectives. Sub-objectives must be sufficiently numerous and specific to be responsive to the particular needs discovered in a detailed, in-depth needs assessment.

Once the objectives and sub-objectives are established, an LEA must decide which activities and services (instructional and noninstructional) are necessary, sufficient, and best able to accomplish those ends. Since programs which address underlying factors contributing to learning problems will be more successful than superficial efforts, this program design step, Step 10, must be based on the results of Step 7. Educational theory -- particularly lessons from evaluations of past Title I activities and services -- must supplement the analysis of contributing factors. Both types of information must be effectively utilized so that the most promising program can be designed.

Resource constraints necessarily limit the extent to which activities and services can be provided to the program participants, but the primary impact of resource constraints must fall on the number of participants selected in Step 5 and the number of general instructional areas selected for emphasis in Step 1. Participants and general instructional areas must be limited so that sufficient funds are available to provide all the activities and services which will ensure each program participant a fully adequate opportunity to accomplish the established objectives. Title I requires LEAs to provide ample activities and services to a limited number of children in a limited number of general instructional areas, rather than to offer inadequate and diffuse services or activities to a larger number of children.

7. Summary of program development steps

The table below summarizes the program development steps which LEAs must take. We recommend that new Title I regulations expressly identify them.

The left hand column identifies and orders the program development steps and indicates in parentheses the program requirement which is the source of the step. Corresponding entries in the right hand column identify the previous steps, if any, on which a given step is premised and the types of information or categories of input on which the step must be based.

Program Development Step	Basis: Previous Steps, Information, Input
1. Decide the general instructional areas -- reading, language arts, mathematics, etc. -- in which instructional services will be provided (program design).	1. Instructional services must reflect emphasis on basic instructional needs, but the selection of particular general instructional areas may be based on value preferences, educational theory as to the areas in which the program is likely to be most effective, or empirical evidence of relative need. Consideration of resource constraints guides the determination of the number of different areas in which instructional services can be offered.
2. Decide the general groups of children who will be considered for participation in the program; general groups means grade spans, and such groups as handicapped children, dropouts, EMR or TMR children, neglected and delinquent children, bilingual children, etc. (targeting).	2. The decision as to which general groups to target may be based on value preferences, educational theory as to the effectiveness of intervention at a particular grade level, or empirical evidence of relative need.
3. Discover which of the children in each targeted general group are educationally deprived in the general instructional areas selected for emphasis. (needs assessment).	3. This needs assessment step is directly premised on Step 1 and Step 2. Within these outer parameters, this step must be an empirical inquiry which identifies the children performing below the level appropriate for their age.
4. Discover which of the educationally deprived children have the greatest need (needs assessment).	4. This step is premised on Step 3 and must be based on empirical evidence. Only children within the same general target group need be compared with each other.
5. Decide which children within each targeted general group will actually participate in the program (targeting).	5. This decision must be based on the policy of serving first those in each general target group who have the greatest need as identified in Step 4. Analysis of resource

Program Development Step	Basis: Previous Steps, Information Input
	constraints must guide the decision as to the number of children who will participate; this is to ensure that services will be adequately concentrated.
6. Discover the incidence and severity of the needs of program participants in each component of each general instructional area (needs assessment).	6. Step 1 determines the subject areas; Step 5 determines the children involved in this step. Within these limits this step is an empirical inquiry, similar to Step 3, but more refined and in-depth.
7. Discover other factors contributing to the participants' educational deprivation and needs (needs assessment).	7. This determination must be thoroughly grounded in an open and unconfined empirical inquiry into factors impeding the learning progress of the children. It is this step which identifies the non-instructional needs which must be met. The empirical information gathered should be interpreted according to relevant educational theory.
8. Determine (through a process involving both discovery and decision) the relative priority of the participating children's needs (needs assessment).	8. Empirical evidence of the incidence and severity of children's instructional needs, as discovered in Step 6, and empirical evidence and analysis of the extent of the relationship between other factors and those instructional needs as discovered in Step 7, must be the primary basis for needs prioritization. Some minor modification based on value preferences or educational theory is allowable.
9. Decide the objectives and sub-objectives of the program (program design).	9. This decision must be based on the policy of meeting first the highest priority needs as determined in Step 8. Sub-objectives must be numerous and specific and must as a group span the full scope of the objectives.

Program Development Step	Basis: Previous Steps, Information Input
10. Decide the activities and services that will be provided to attain the objectives and sub-objectives (program design).	10. The activities and services necessary, sufficient, and best able to accomplish the program objectives and sub-objectives must be the ones chosen. This decision must be based on the analysis in Step 7 and consideration of educational theory (particularly past program evaluations). Resource constraints necessarily limit the extent to which activities and services can be funded, but the primary impact of resource constraints must concern the number of participants (Step 5) and the number of general instructional areas (Step 1), not the extent to which necessary activities and services are provided.

F. Organization of this Chapter

The body of this Chapter discusses in greater detail the bases of, and interrelationships among, the ten steps of the program development process. The discussion of each step begins with an analysis of the federal legal provisions from which it originates. Interpretations of, and additions to, these provisions contained in documents which are part of the informal federal legal framework are presented next, followed by significant state policies. The issues raised by these sources are analyzed and recommended changes in the existing legal framework are offered to correct identified problems.

II. Program Development Steps: Legal Origins and Requirements, State Policies, Analysis and Recommendations

Careful analysis of the current Title I legal framework identifies each of the steps of the program development process. Section 141(a)(1) of the statute generally identifies the three requirements: targeting of children, needs assessment, and program design, when it requires that Title I funds be used for "programs and projects . . . which are designed to meet the special educational needs of educationally deprived children." This basic provision and other statutory and regulatory standards prescribe, though at times only implicitly, each program development step.

Section 141(a)(1) also indicates generally that targeting, needs assessment, and program design are interrelated Title I requirements. The requirements are met in sequential steps and the results of earlier steps affect later ones. As §116.18(b) of the regulations indicates, targeting is related to needs assessment because it is the "needs of the educationally deprived children" that must be assessed. Needs assessment, in turn, is a basic premise of program design; §116.18(b) states that project objectives must be formulated "in relation to" the needs identified in the needs assessment. The interrelationship of these three Title I requirements is more complex, however, since none of the steps originating in one requirement either precede or follow, as a group, those of either of the other two requirements. Steps of each are interspersed throughout the sequential ordering. One of the significant failings of the current regulations is the absence of clear explication of this interrelationship.

Another, as we mentioned in the introduction, is the failure of the current legal framework to provide any express indication of the types of information or categories of input which must be used in meeting the targeting, needs assessment, and program design requirements. Nonetheless, certain principles are implicit (needs must be assessed, not guessed; therefore, empirical evidence must be gathered, etc.)

The paragraphs which follow discuss the legal origins of each program development step, legal standards governing the performance of these steps, significant state policies, the problems and issues raised by the legal provisions, and our recommended resolutions.

A. Step 1 -- Decide the General Instructional Areas

Where does the program development process begin? The legal provisions say LEAs must identify the educationally deprived children and assess their needs. On what subject areas should the inquiry into educational deprivation and needs be focused? Answering this question must be an initial program development step.

Clearly, the most important consideration involved in answering this question is judgment as to the subjects one thinks should actually be taught in the program; this judgment is a program design decision.

Should LEAs be required to assess needs in a wide variety of general instructional areas and base their program design decisions on empirical "proof" concerning the general areas in which the most deprivation exists? Or should LEAs be allowed to make an initial judgment concerning the focus of the program and confine the assessment of instructional needs to selected general instructional areas?

One state in our survey requires its LEAs to measure educational deprivation by standardized tests in reading, language arts, and mathematics; the results dictate the program priorities. Another SEA's policies encourage LEAs to assess needs in "more areas than the Title I budget could possibly fund." Other states, however, allow their LEAs to decide in advance to concentrate on one general instructional area, such as reading.

We recommend that new Title I regulations not require LEAs to justify selection of general instructional areas in terms of empirical evidence. The selection of general instructional areas is inherently judgmental; it is doubtful that any quick and easy means could make it scientific. Rather than mandating exhaustive empirical inquiry into areas of need that will subsequently be rejected as "proven" low priorities, federal regulations should allow advance limitation of programs to particular general instructional areas. This would allow scarce needs assessment resources to be utilized for more refined, in-depth inquiries into the selected areas.

New regulations should not require initial limitation of the general instructional areas nor prohibit the use of empirical data in selecting general instructional areas -- consideration of empirical evidence in selecting general instructional areas would be a sound practice -- the regulations should simply not attempt to enforce a standard of empiricism in this area.

Rather, other standards should be enforced concerning the selection of general instructional areas. These standards are as follows: 1) the areas selected must be instructional areas, since the purpose of Title I is to improve educational attainment; non-instructional activities and services cannot be independent ends in themselves; 2) the instructional areas selected must reflect emphasis on basic instructional needs; 3) only general areas may be determined initially; more detailed program design decisions must await the results of the needs assessment.

The first point was misunderstood more in the early days of Title I than now. Nonetheless, it merits full discussion.

The subject areas chosen must concern educational attainment because Title I serves educationally deprived children;

under the regulations (§116.1(i))

> 'Educationally deprived children' means those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. [Emphasis added.]

"Educationally deprived children" is a statutory phrase, but the term has never been defined in the legislation. Nonetheless, the regulatory definition is long-standing, Congress has not rejected it during any of its several reconsiderations of the original legislation, and the Senate report accompanying the 1974 education amendments expressed a nearly identical construction of the phrase:

> Educational deprivation is the sole criterion for choosing individual students within a Title I school for special educational assistance. Educationally deprived children are those who need special help to perform at grade level. 137/

Interpreting a similar situation, the Supreme Court recently stated:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is

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137/ Sen. Rep. No. 93-763, 93rd Cong., 2d Sess. 9 (1974).

the one intended by Congress.[138]

The requirement that improving educational attainment be the ultimate objective of Title I programs was at one time confused by the language of §116.18(e) of the regulations, which reads:

> Applications for grants . . . are to be concentrated on . . . projects . . .[for] improvement in the educational attainment, motivation, behavior or attitudes of children. [Emphasis added.]

The use of "or" implies that motivational or attitudinal objectives alone might be proper objectives for a Title I project. This is inconsistent with the definition of educationally deprived children which indicates that only improvement in educational attainment can be the ultimate objective of a Title I project.

Documents in the informal Title I legal framework and state policies, however, have overwhelmingly rejected the implication of §116.18(e) that objectives other than improving educational attainment can be independent ends of a Title I program.

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[138] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) at 274-275. New OE regulations are now subject to Congressional resolutions of disapproval. The 1976 GEPA Technical Amendments included a provision indicating that the mere failure of Congress to issue such a resolution is not to be construed as Congressional approval of a regulation. The regulatory definition of educationally deprived children, of course, antedates both the disapproval resolution provision and the Technical Amendments by several years. Furthermore, the use of a nearly identical definition in the 1974 Senate Report distinguishes the status of the long-standing regulatory definition from that of a newly-issued OE interpretation, and places the regulatory definition of educationally deprived children within the ambit of the Bell Aerospace doctrine.

In discussing this point, Title I ESEA: How It Works, at 3, states:

> The first paragraph of the law . . . says money will be given to local school districts to meet 'the special . . . educational needs of educationally deprived children.' . . . The word 'educational' emphasizes the federal government's idea that Title I should be an instructional not a welfare type program. This does not mean that . . . Title I services must be limited to classroom help . . . . Supportive services might include free breakfast, medical exams, dental treatment and field trips, but because Title I is an educational program these services must be related to some educational need.

In a letter to a Congressional Representative, OE explained the application of this principle to Title I physical education programs. In the situation in question, OE found that

> the physical education component was included in the project on the basis of a needs assessment which indicated that project participants were deficient in motor skills, a deficiency associated with retardation in reading skills;

OE then concluded:

> the physical education component, therefore, was included in the reading project in order to assist participating children in reaching achievement objectives set for the project.

In making the second main point identified above -- that the general instructional areas selected must reflect emphasis on basic instructional needs -- Congress has also commented on the need to ensure that non-instructional services be related to, and supportive of, educational attainment objectives. The House committee report accompanying the 1974 education amendments explicitly stressed both these points:

Basic Skills

> The Committee believes that local educational agencies *should give priority attention* in operating Title I programs *to the basic cognitive skills* in reading and mathematics and to *related* support activities to eliminate physical, emotional, or social problems that *impede the ability to acquire such skills*. [Emphasis added.]139/

Similarly, the 1974 Senate report stated

> The Committee recognizes that basic skills are undoubtedly important, and was pleased to note that the bulk of existing Title I programs focus on such skills . . . .
>
> Local officials are charged with developing local solutions to meet their specific needs. Often the solutions involve remedial education programs in basic skill areas. But many local officials have found that their children's educational progress also *depends on* provision of auxiliary services such as guidance and counseling programs or cultural enrichment. Title I is not

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139/ H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 4111-4112 (1974). This portion of the report was also quoted by a September 11, 1975, OE letter to a state included in our survey. The letter identified the passage as manifesting the "expressed intent of Congress."

> basically a social services program; occasionally, however, such social services are necessary if education is to take place. 140/ [Emphasis added.]

Thus, the target of noninstructional services must be "problems that impede the ability" of students to "make educational progress," and such services may be provided to the extent that educational progress "depends on" them or they are "necessary if education is to take place" at all.

All of the states in our survey have policies which require that instructional objectives be primary and all others subordinate to, and supportive of, these primary objectives. One state, for example, expressly requires that each supportive component of a Title I project be evaluated in terms of its

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140/ Sen. Rep. No. 93-763, supra, at 30-31. The Senate report offered these comments in the context of specifically rejecting a proposal that the Title I emphasis on "basic skills" be accomplished by a standard requiring a minimum amount of expenditure on such skills (75% of all funds). Noting that such a standard would pre-empt the findings of local needs assessments and thus sometimes prevent the provision of services that are in fact necessary, the Senate committee indicated that the underlying purpose of such an "amount" standard (i.e., ensuring primary emphasis on "basic skills") would be better accomplished by ensuring that noninstructional services are offered not as ends in themselves but only when necessary to attack problems impeding instructional progress. In this way, instruction would be primary, but all services found by a needs assessment to be needed to solve instructional problems could be provided without artificial restriction.

impact on the instructional component, which must be primary.

Thus, despite the language in §116.18(e) which implies that attitudinal or motivational objectives might be independent primary objectives of a Title I project, OE's (and Congress's) clear indication to the contrary in other documents has generated concurring policies in all the states in our survey.

We recommend, nonetheless, that new Title I regulations expressly clarify this point.

New regulations should also clarify the meaning of the second main point identified above -- that the general instructional areas selected must reflect emphasis on basic instructional needs. Is there a finite list of subjects constituting "basic instructional" services from which LEAs must select the particular instructional services to be emphasized in their programs? If there is no finite list, what standard determines whether an LEA's program properly emphasizes basic instructional needs? Or is it sufficient to leave the question to the discretion of LEAs, with SEA oversight and technical assistance efforts assuming responsibility for correcting any significant abuses that might occur? New regulations should specify the approach to be taken in implementing the Congressional emphasis on basic instructional needs.

Another standard which OE should specifically enforce is the requirement that only general instructional areas be designated by the initial step of the program development process. Section 116.18(b) of the regulations requires that the objectives of a project be described "in relation to" the needs identified in the needs assessment. Before the details of a Title I program can be planned, a needs assessment must be performed, for it is the specific needs identified in the needs assessment that the program must address.

Title I requires LEAs to properly balance sound judgment and empirical inquiry in developing their programs. While the needs assessment provision does not require LEAs to assess needs in every imaginable subject area before basic program decisions can be made, it does prohibit detailed planning of Title I programs in advance of, and without regard for, serious empirical inquiry.

In our survey we found one state which openly admitted that until recently nearly all its LEAs designed their Title I programs in detail prior to assessing needs. OE has not provided sufficient regulatory guidance regarding the extent to which empirical needs assessment data must influence the program development process. We recommend that new regulations expressly indicate that while LEAs may select general instructional areas substantially on the basis of value preferences, decisions concerning project objectives and sub-objectives must await a thorough, empirical needs assessment.

B. Step 2 -- Decide the General Target Groups

Knowing the general instructional areas in which a Title I program will focus is not enough to begin a needs assessment. Whose needs will be assessed? Whose educational deprivation will be measured? This is an area in which OE documents have been inconsistent and confusing.

Program Guide #44 states that LEAs must prepare "a carefully documented list of needs in order of priority" for each major group of potentially eligible children -- "preschool children", "children in early elementary school", "children in later elementary school and secondary school years", "dropouts," "children in institutions", "handicapped children", and "non-English speaking children".

Title I ESEA: How It Works, at 17, states that LEAs should select a "key indicator" (such as a standardized reading test) and "apply it to children at all ages and grade levels." (Emphasis added.) One page later, however, this same OE document mentions approvingly a flatly contradictory policy:

> Some states have set priorities for their school districts by limiting the use of Title I funds to elementary schools; this means the needs of students in grades 7 to 12 are not even considered in the needs assessment.

Nearly all states in our survey either require, or allow, LEAs to limit their needs assessments to initially selected general target groups. Some states limit their needs assessments to elementary students. One state expressly excludes educable, or trainable, mentally retarded children from consideration.

We recommend that LEAs not be required to offer empirical evidence "proving" that one general group of potentially eligible children should be targeted prior to another. The selection of general target groups should be a thoughtful judgment, but it should be a judgment, nonetheless. As such it should be permitted prior to the initiation of deliberate empirical inquiry. Value preferences, or educational theory concerning, for example, the most effective grade level for intervention, should be recognized as acceptable bases for the selection of general target groups. Empirical evidence concerning the academic performance of different groups or grade spans, is of course, useful as an aid in targeting general groups but the Title I regulations should not require that this information be used in any particular way.

To be sure, it might be possible to establish standards for measuring the relative deprivation of high school versus elementary students, dropouts versus bilingual children and then gather evidence to determine empirically the most educationally deprived, but such standards would, themselves, be value-laden, and the process would necessarily involve gathering large amounts of data on children who will subsequently be rejected as program participants. The effort expended in such an undertaking could probably be better applied to learning more about the needs of the children who will actually be served.

Some LEAs may wish to serve several different general groups. This should certainly be permitted. Other LEAs, however, should not be required to conduct massive empirical inquiries before they can decide to offer, for example, a reading program for grades 2 through 5.

Step 2 of the program development process, the selection of general target groups, is not necessarily subsequent to Step 1, the determination of general instructional areas. Either one may be first; in most cases they will best be made concurrently. Different general areas may be selected for different target groups (reading in grades 1-3; mathematics in grades 4-6, etc.) These decisions constitute the basic premises for the needs assessment and ensure that the assessment focuses on the most relevant information. Nonetheless, new regulations should indicate that the needs assessment must not be overly confined. Only general groups and general instructional areas may be identified in advance of an empirical needs assessment.

C. Step 3 -- Discover the Educationally Deprived Children

After general target groups and instructional areas are established Title I requires LEAs to begin serious empirical inquiry. LEAs must discover which of the children in each target group are educationally deprived in the designated instructional areas. All the members of some general target groups, EMR or TMR children, for example, may by definition be educationally deprived. In such a case an LEA proceeds directly to Step 4 to find out which of those in the group have the greatest need. Groups designated by grade span, however, will in all likelihood contain children who are not educationally deprived. The current regulation defining educationally deprived children, §116.1(i), contains a standard for determining those who are eligible. Under this provision educationally deprived children are those who are performing below the "level of educational attainment . . . appropriate for children of their age."

The need to discover the educationally deprived children in each general target group is a program development step universally recognized by the states in our survey. The types of information or categories of input on which this step must be based, however, are not clearly understood by all states. One state in our survey, for example, allows its LEAs to assume that all children from poor, culturally isolated areas are educationally deprived.

New regulations should expressly state that the identification of educationally deprived children must be based on empirical evidence of the current level of educational attainment of children in the selected general instructional areas. Evidence of poverty or cultural isolation might be empirical, but it is not the kind of direct measure of educational deprivation required by Title I.

D. Step 4 -- Discover the Educationally Deprived Children Having the Greatest Need

Section 116.17(f) of the Title I regulations requires LEAs to serve "those educationally deprived children who have the greatest need for assistance." If an LEA has decided to offer mathematics to seventh graders and reading to first graders, does §116.17(f) require LEAs to "determine" whether the former need their math instruction "more" than the latter need their reading lessons? Federal documents do not answer this question, though Title I ESEA: How It Works, at 17, indicates that variable cut-off scores on a "key indicator" might be used in making the initial identification of educationally deprived children:[141]

> For instance, the key indicator may be reading levels. For children in grades 1 and 2, anyone reading 6 months or more below the classroom would be considered educationally deprived; in grades 3 to 6, the criteria might be 1 year below grade level; in grades 7 to 12, 2 or more years.

The OE document does not extend this analysis to cover situations where different subjects, as well as different grade levels, are involved.

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[141] The quotation, of course, describes the issue improperly. By legal definition, all children below grade level are educationally deprived. The issue discussed does not concern the definition of educational deprivation, but a possible standard for implementing the "greatest need" requirement across different grade levels.

One state in our survey expressly implements a policy similar to that quoted above. Another state compares educational deprivation at different grade levels according to the ratio formed by placing a child's actual level of attainment in the numerator and the level of attainment appropriate for the child's age group in the denominator. Thus, a third grader performing at first grade level (1/3) is "more" educationally deprived than a fifth grader performing at second grade level (2/5).

We recommend that Title I regulations not require LEAs to mathematically compare the deprivation of children in different general target groups for purposes of implementing the greatest need requirement. The question of whether a sixteen-year old dropout's mathematics needs are greater than a seven-year old Spanish-speaking student's need for bilingual reading instruction should not be one for which the law requires a quantitative analysis.

New regulations should expressly indicate, however, that the greatest need standard does require comparison of children's relative educational deprivation within a given targeted general group. An LEA may determine those in a group having the greatest need in each general instructional area; or, if a firm decision to fund instruction for the group in more than one general area has been made, an LEA may formulate some means of combining separate rankings into a composite indicator of overall greatest need.

E. Step 5 -- Decide the Program Participants

Once the educationally deprived children are identified in order of greatest need, an LEA is ready to select the program participants, Step 5. Under §116.17(f) of the regulations Step 5 must be based on the policy of selecting first those who have the greatest need, as indicated in Step 4.

How many children may be selected? Resource constraints answer this question. Under §116.18(e) of the regulations Title I funds must be "concentrated on a limited number of projects and applied to a limited number of educationally deprived children." (This requirement is the subject of Chapter 7.)

LEAs must make two resource judgments. First, they must allocate the available funds to each general targeted group. This decision may be based on value preferences. (The greatest need standard does not require quantitative comparison of the relative need of different target groups.) An LEA might at this point decide to not fund one group at all (such a decision would, essentially, be a revision of the decision in Step 2).

Second, an LEA must estimate the number of children within each group whose needs can be met with the resources allocated to that group and then determine a "cut-off point" so that each child selected to participate can be shown (using the results of Step 4) to have greater need than non-selected children in the same general target group.

This second determination is difficult because it involves anticipating the cost of meeting needs to be discovered in subsequent needs assessment steps. The determination will probably have to be revised later, but experience will enable LEAs to make increasingly accurate estimates. LEAs should, at this point, make a high estimate of the number of children who can be served to ensure that more than enough children are included in the subsequent needs assessment steps.

The points in the program development process at which the constraints of limited resources should apply, and the ways in which they should apply are subjects which have not been clarified in federal documents. We recommend that new regulations address this issue in a manner consistent with the principles outlined above. (This subject is discussed more fully in Section J, infra, concerning the determination of program activities and services.)

F. Step 6 -- Discover Needs in the Component Areas of Each General Instructional Area

After the program participants are selected, an LEA must assess their needs in detail. Thus, the sixth step of the program development process is to discover empirically the incidence and severity of the needs of the program participants in each component of each general instructional area. This is the first needs assessment step intended to serve as a basis for program design steps. (Previous needs assessment steps, Steps 3 and 4, are for targeting purposes.) The key point is that needs assessment steps for program design purposes must be more refined and in-depth than those which are adequate for targeting children.

This point is implicit in the current legal framework. Project objectives must be formulated "in relation to" the needs identified in the needs assessment. (See §116.18(b) of the regulations.) The statute indicates that project objectives must be identified with substantial specificity. §141(a)(7), a section concerning evaluation, states:

> The local educational agency will make an annual report . . . containing . . . information (which in the case of reports relating to performance is in accordance with specific performance criteria related to program objectives) as may be reasonably necessary. [Emphasis added.]

Thus, at some point in the program development process "specific performance criteria" must be formulated. These criteria must relate directly to the program objectives which must, in turn, relate directly to the needs assessment. Also, OE's Handbook on Performance Objectives and Title I ESEA: How It Works both stress the need for specific, narrow objectives. (See Section I, infra.)

To adequately support the formulation of specific performance criteria and objectives, it is apparent that the needs assessment, itself, must be sufficiently specific. Title I ESEA: How It Works, at 17, expressly indicates that for purposes of "pinpointing" and "diagnosing" children's needs very specific information must be gathered while for targeting purposes the needs assessment can employ general indicators:

> To determine which children are not performing as well as their classmates, a school district can use a number of sources, including achievement records, reading levels, and standardized tests.
>
> The school district should choose one of these sources as a "key indicator", or the most important guide in the selection of children with learning problems . . . .
>
> Knowing that a child is educationally deprived does not tell program planners anything about the child's learning problems, the causes of those problems, or his needs. At this point, it is necessary to consider the child as an individual, not as part of a group . . . .
>
> The school should gather both objective and sub-objective information on educationally deprived children . . .[to] give Title I program planners a good indication of what a child's problems are.

This point needs to be explicitly stressed in new regulations. Only two states in our survey have policies expressly implementing it. The majority of states include one which expressly allows its LEAs to limit their needs assessments to standardized tests in general areas. Such a policy is inconsistent with the Title I legal framework.

We recommend that new regulations expressly require LEA needs assessments to discover the incidence and severity of participating children's needs with respect to each component of each general instructional area selected in Step 1, above. Such a regulatory provision is needed to ensure that LEAs meet the minimum standard of needs assessment specificity necessary to formulate project objectives.

G. Step 7 -- Discover Other Factors Contributing to the Educational Deprivation or Special Needs of the Program Participants

The purpose of Step 7 of the program development process is to go beyond identification of the mere presence of need and discover the factors which may be contributing to the learning problems of the participating children. This step is normally simultaneous with Step 6.

Section 116.7(c) of the regulations requires Title I projects to be designed "in such a manner . . . as will best meet the special educational needs of the educationally deprived children." Since projects which address underlying factors contributing to the problems of educational need and deprivation are clearly superior to superficial measures directed only at symptoms, an inquiry into such factors is implied by this section of the regulations.

Title I ESEA: How It Works, at 17, indicates this expressly:

> Knowing that a child is educationally deprived does not tell program planners anything about the child's learning problems, the causes of those problems, or his needs . . . .
>
> The school should gather both objective and subjective information on educationally deprived children . . . .
>
> The data will give Title I program planners a good indication of what a child's problems are and the causes of such problems. 142/

142/ How It Works, as well as state policies which address the subject, identifies Step 7 as an inquiry into the "causes" of children's educational deprivation and special needs. These documents never use that term in a restrictive sense. They do not require LEAs desiring to offer food services, for example, to prove with scientific rigor, massive studies, regression analyses, etc. that improper nutrition is the ultimate cause of educational problems. They simply ask LEAs to (1) employ the knowledge of educational theory they have (and the program design requirements ask LEAs to make at least modest efforts to keep improving their knowledge in this regard); (2) give thought to the unmet needs that might be the causes of the children's educational problems; (3) investigate, as part of the needs assessment, whether the children to be served by the program actually have the needs thought to be causing the problems, and (4) analyze the importance of meeting those needs in light of both the tenets of educational theory and the empirical evidence generated by the investigation. The text of How It Works, quoted above, offers an example of what it means to investigate the causes of children's learning problems: "For instance, school records may show a child has difficulty reading. In talking with the mother, a school official may find out the child often falls over things, misjudges distances, and so forth. Then a doctor may confirm that the child needs glasses and probably can't read without them." Though the Title I legal framework does not use the term "causes" in a restrictive sense, we have substituted the phrase "contributing factors" for the purposes of this paper. The purpose of this substitution is not to change in any way the meaning of the Title I legal framework but to avoid misunderstanding by those to whom the term "causes" connotes a conclusion reached only after rigorous scientific inquiry that is beyond the capability of LEAs.

This inquiry is a critical step in the program development process because it identifies the non-instructional needs of the project participants. Meeting non-instructional needs cannot be an independent objective of a Title I program; a decision to provide non-instructional services must be based on analysis of the relationship between the non-academic need addressed and an academic need. Step 7 undertakes the necessary analysis.

Inquiry beyond the mere presence of need is also important because it may discover instructional needs in other areas which are related to instructional needs identified in Step 6. Title I ESEA: How It Works, at 17, summarizes both of these points:

> In pinpointing a child's educational problems and what causes them, the parent council and school officials must think about the child's academic skills (reading, vocabulary, listening, speaking, his attitude toward school, his motivation, his physical and mental health).

SEA policies in three states in our survey stress the need to discover underlying factors contributing to the educational deprivation and needs of children. The other states, however, do not have policies which ensure that this significant step is performed.

We recommend that new regulations expressly require inquiry into the factors contributing to learning problems so that the most promising instructional services can be selected and the most relevant non-instructional needs identified. New regulations should state that inquiry into these factors must be an open, unconfined, empirical inquiry which interprets the information gathered in light of educational theory. Step 7 must not be an armchair guess.

H. Step 8 -- Prioritize Needs

Once the incidence, severity, and contributing factors of the participating children's needs are identified, a final needs assessment step must be performed before the details of the program can be designed. This is Step 8, the determination of the relative priority of the children's needs. This requirement is implicit in §117.18(e) of the regulations which states that Title I funds must be "concentrated on a limited number of projects". To have a rational basis for the concentration of funds LEAs must determine the relative importance of the needed activities and services. Program Guide #44 states this expressly:

> The needs of the children . . . must be set forth on the Title I application in order of priority.

Nearly all the states in our survey have policies which recognize the necessity of prioritizing needs. We recommend that the language of Program Guide #44 -- which correctly interprets the implications of the concentration requirement for LEA needs assessments and which over time has won widespread acceptance -- be incorporated in new regulations. New language, however, should also indicate that Steps 6 and 7 must be the primary bases for the prioritization of needs. Instructional needs that are the focus of the needs assessment (those discovered in Step 6) must be prioritized according to their incidence and severity (any consistent, rational weighting of these two factors to form a single priority index is allowable). Needs discovered to be factors contributing to the needs discovered in Step 6 must be prioritized according to the extent of the contribution. Major factors contributing to the presence of high priority instructional needs must, themselves, be considered high priority.

One state in our survey automatically -- without analysis or empirical inquiry -- assigns low priority to needs which may be major factors contributing to significant academic problems. New regulations should expressly reject such a policy. Minor modifications of empirically determined priorities, made in accordance with LEA value preferences or educational theory, are acceptable; but such modifications must not be so extensive as to nullify the significance of the empirical input.

I. Step 9 -- Decide the Objectives and Subobjectives

The ninth step of the program development process is to decide the objectives and sub-objectives of the Title I program. This step is based on the policy of serving the highest priority needs first (as identified in Step 8).

The current legal framework includes some provisions that can be satisfied only by objectives having a broad, general scope, and includes others that require objectives having a scope which is narrow but directly related to the accomplishment of the broader objectives. Both types of provisions refer to "objectives," and this is a source of confusion and difficulty, since objectives which satisfy one type of provision generally do not satisfy the other. For purposes of clarity we use the term "objective" when referring to objectives which concern the full scope of a general instructional area (such as reading) and the term "sub-objective" when referring to objectives which concern a component of a general instructional area (such as vocabulary). With the terms defined in this way it is clear that the current legal framework requires LEAs to establish both objectives and sub-objectives.

Sections 151(d) and 151(f) of the statute require objectives having a broad, general scope. These provisions state that Title I projects must be designed so that they can be evaluated by federally-established "uniform procedures and criteria" which will generate "data . . . comparable on a statewide and nationwide basis." Since objectives are the basis of an evaluation, a Title I project must have general objectives suitable for this purpose.

At the same time, Title I projects must be directly responsive to the particular, and perhaps unique, needs identified in the needs assessment. For program design purposes, objectives having a highly specific, narrow scope must be formulated.

Section 4.3 of Program Guide #44 says, "the compensatory education objectives . . . should be . . . stated in terms of the types of changes that are sought . . . as a result of each major activity." (Emphasis added.)

OE's Handbook on Performance Objectives, at 7, amplifies the requirement that objectives be formulated for each major activity in an academic area, not just for the academic area as a whole:

> While the long range broadly stated goal of the program might relate to improvement in a particular academic area the performance objectives which are written for the program are much more specific and narrow in scope and concentrate on a particular activity or behavior designed to lead to the improvement desired, i.e., the program goal.

The handbook continues, saying, at 15, "objectives are usually very specific and have intentional end results," and, at 16, that objectives "should be specified by verbs or action words which should be open to as few interpretations as possible." The handbook offers an example of an objective meeting these standards; it has a very narrow scope concerning the solution of ten arithmetic problems.

Title I ESEA: How It Works, at 38, includes examples of both broad and narrow objectives. After indicating that for a reading project a broad objective concerning "reading achievement" is needed, the document continues, saying "separate objectives must be written for each project and for each behavioral outcome anticipated." (Emphasis added.) The OE document illustrates the concept of "behavioral outcome" objectives by utilizing the example of a field trip having objectives with a very narrow scope.

Thus, both broad and narrow objectives are needed. Furthermore, since Title I projects must be "well planned" (see §116.18(b)), the narrow objectives must be directly supportive of the broad objectives. They must, in fact, be sub-objectives which cover more specifically a portion of the subject area encompassed by the objectives. Taken as a whole, the sub-objectives must be designed to span the full scope of the objective they support so that accomplishment of the sub-objectives maximizes the likelihood that the objective, too, will be reached. The purpose of this requirement is to prevent gaps in instructional services which could defeat the accomplishment of objectives inspite of the success of the program components that are offered. This requirement also facilitates analysis of the reasons why a particular objective was not attained, should that occur. If sub-objectives span the full scope of an objective, failure to attain the objective should be traceable to failure to attain one or more of the sub-objectives, thus, providing specific information as to the areas in which the program needs to be strengthened.[143]

Two states in our survey have, in fact, correctly interpreted the legal framework as requiring both objectives and sub-objectives. In one of these states the SEA requires that one or more instructional objective be formulated for each general instructional area. In addition, the SEA requires that performance objectives be formulated as a basis for the design of particular instructional activities. The SEA policy identifies three types of these performance objectives: (1) "knowledge or skills" objectives, the scope of which must concern "specific knowledge" or ability to "solve specific types of problems"; (2) "social and cultural understanding" objectives; (3) objectives concerning "ability to create designs."

In the absence of explicit federal guidance concerning the proper scope or degree of generality of Title I objectives, however, most states in our survey have not formulated clear policies. The instructions for completing an LEA application in one of these states indicates merely that "reading achievement" or "general attitude toward the school environment" might be appropriate types of behavior to be specified in performance objectives. Three other states take similar approaches.

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[143] The formulation of sub-objectives requires careful consideration of both the specific deficiencies discovered during the needs assessment and educational theory as to the specific kinds of competencies which normally need to be imparted through instruction in order for children to acquire the knowledge and skills that will enable them to accomplish the objective established for a general instructional area. The methodological rigor which must be employed in the formulation of sub-objectives is a subject beyond both the scope of this chapter and the limits of our expertise. The discussion here is confined to identification of the basic analytical process and relevant considerations associated with the performance of Step 9. As with all other program development steps, the obligation of LEAs is to perform this step to the best of their ability. Through attention to past experience, careful study of past program evaluations, use of disseminated information concerning developments in educational theory, and responsiveness to SEA technical assistance efforts LEAs must also seek to improve their ability in this regard.

Objectives having a very general scope are necessary for the purpose of national evaluations. Objectives having a very narrow scope must be formulated for program design purposes. We recommend that new Title I regulations expressly identify these two major purposes of project performance objectives, and expressly require that both types of objectives be formulated; new regulations should also require that the specific objectives directly support, and in fact be sub-objectives of, the more general objectives.

J. Step 10 -- Decide the Activities and Services

The final step of the program development process is to decide the activities and services that are necessary, sufficient, and best able to accomplish the objectives established in Step 9. Section 141(a)(1) of the statute requires programs which "give reasonable promise of substantial progress." Under §116.17(c) of the regulations, Title I projects must be designed "in such a manner . . . as will best meet the special educational needs of the educationally deprived children." Section 116.18(b) says that each Title I project must be "well planned" and include "adequate provision for its implementation in an effective manner."

Because the most effective activities and services address underlying factors contributing to learning problems, not just the symptoms of the problems, the results of Step 7 must be considered in selecting the most appropriate activities and services. Complementing this information, educational theory concerning the activities and services likely to be most successful must also be used. The findings of educational research and evaluations of past Title I programs are prime sources of theory which LEAs are required to utilize. Under §141(a)(10) of the statute LEAs must adopt

> effective procedures . . . for acquiring . . . information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects.

Section 4.3 of Program Guide #44 states that with respect to each major activity proposed for a Title I program

> reference should be made to evaluations of similar activities carried on during preceding years, the program changes that have been made as a result of such evaluations, and the types of improved performance expected by the end of the new program year.

Resource constraints must not be allowed to prevent the provision of activities and services necessary to give each participant a fully adequate opportunity to accomplish the objectives of the program. Program Guide #48 states

> the evaluation reports we have examined indicate that Title I programs, if they are to be effective, must be designed to meet the multiple needs of individual children.

The impact of resource constraints must fall elsewhere, specifically, the decisions in Step 1, general instructional areas, and Step 5, selection of program participants. Severe limitation of the general instructional areas, moreover, is not a permissible approach to the problem of limited resources. Academic deficiencies in one area are frequently contributing causes of problems in another. Though limitation of the general instructional areas to a small range of basic subjects is a permissible means of controlling costs, further limitation may be counterproductive. Thus, the ultimate point where the impact of resource constraints must fall has to be the number of participants in the program.

Few of the states in our survey have policies which ensure that the determination of activities and services utilizes research information and past evaluations. Few ensure that the results of an empirical inquiry into contributing factors are considered. Few have policies which ensure that the impact of resource constraints falls in the proper place.

We recommend that new Title I regulations expressly address these issues and incorporate the principles outlined by Program Guides #44 and #48 and §141(a)(10) of the statute. (Chapter 6 on program design discusses these points further.)

III. Continuation of Program Development During Program Implementation

The program development steps analyzed above are the minimum steps an LEA must take to start a Title I program, but program development continues after the program begins. Teacher observations and other means update and further refine the needs assessment. This information facilitates more detailed planning of program sub-objectives, activities and services.

Continuing assessment efforts may uncover important needs that are not being met. Also, once the program begins, the effectiveness of the activities and services must be evaluated. This needs assessment and evaluation information must be used in the consideration of program design changes. Needed changes that are feasible within existing budget constraints must be made. The information gathered must also be kept and utilized for planning next year's program. Needs assessment, program design, and evaluation form a continuing feedback cycle which discovers children's needs and analyzes the effectiveness of program activities and services with increasing accuracy and refinement so that Title I programs can be constantly improved.

Section 4.3 of Program Guide #44 stresses the need to constantly improve the detail and precision with which project sub-objectives are defined.

> As applicants gain more and more experience they should become more precise concerning what they expect to accomplish through their Title I programs.

Increasing the precision with which project sub-objectives are defined requires improving the refinement and detail of the needs assessment because, under the regulations, project sub-objectives must be defined "in relation to" the needs identified by the needs assessment.

OE's Handbook on Title I Performance Objectives indicates the manner in which evaluation efforts contribute to the continuous improvement of Title I programs. In discussing the steps of the program development process, the handbook, at 9, states that evaluation information gathered on a daily basis must be fed into the program design process, thus forming a continuing program development cycle:

> Evaluation provides the basis for change . . . . It includes a continuous review of the day-by-day activities and management of the project . . . . Evaluation, properly designed, makes recycling to a previous step possible at any point.

A policy of one state in our survey states this point particularly well:

> Evaluation is part of the teaching process and should contribute information during the project period as well as at the end. Evaluative information may lead to changed methods or changed objectives or both.

The statutory and regulatory bases from which these principles stem are 1) §141(a)(10) of the statute which requires LEAs to establish "effective procedures . . . for evaluating . . . the effectiveness" of their programs; 2) §116.17(c) of the regulations which requires projects designed "in such a manner . . . as will best meet" children's needs, and 3) §116.18(b) of the regulations which requires projects "well planned" to meet their objectives.

Title I resources are scarce; not all educationally deprived children can be served. LEAs owe to their unserved educationally deprived children the duty of making Title I projects as efficient and effective as they can be so that the participants may move back into the regular program and free Title I funds for the as yet unserved. Fulfilling this duty requires continuous attempts to improve programs, which, in turn, requires continuous evaluation and improvement of the accuracy and detail with which needs are identified.

A significant minority of states in our survey have policies which expressly require both continuous, increasingly accurate needs assessment and evaluation efforts and timely, effective use of that information to improve ongoing Title I programs. Too many states do not, however; for this reason, we recommend that new Title I regulations expressly require LEAs to establish and utilize a program improvement process which includes a continuous needs assessment, program design, and evaluation feedback cycle.

IV. Limitations of the Principles and Recommendations of This Chapter

This chapter necessarily discusses general principles. Other chapters which discuss targeting, needs assessment, and program design in greater detail mention principles and recommendations which are qualifications of some of the general points stressed here. For example, the principle which allows LEAs to target children on the basis of their participation in a previous Title I program is an important proviso which modifies the greatest need requirement.

Also, this chapter does not discuss all of the interpretations and applications of the general principles presented. In areas with highly mobile populations, for example, LEAs are frequently unable to select the actual program participants until the school year begins. This affects the timing of the program development process and gives rise to the need for preliminary estimates and tentative decisions which will be revised or confirmed later. Factors, such as population transiency, which are beyond the control of an LEA necessarily qualify what we have said. We have not attempted to exhaustively identify these factors.

We have defined the terms, "targeting," "program design," and "needs assessment" in particular ways. We have introduced the terms "program development" and "sub-objective" and defined them specifically, too. We have identified the program development process in ten steps. None of these concepts, in themselves, are necessary principles; they are simply the tools we have utilized to set forth and organize the important substantive principles which Title I implements. We think our definitions and concepts facilitate clear and consistent discussion of the substantive issues and for this reason we have used them.

It would be possible to redefine our terms and, for example, call Step 3, identification of the educationally deprived children, a targeting step. It would be possible to redefine Step 1 as "decide the general areas in which needs will be assessed" and call it a needs assessment step. Such concepts would organize the program development process in more or less steps than the ten we identify.

We have adopted a vocabulary which we feel facilitates conceptual clarity yet preserves as much as possible the historical meaning of familiar terms. We readily admit, however, as we must, that different terminology could be used to express the same principles we have presented. Discussion should not focus on the initial selection of definitions; some are neater than others, but they are all essentially arbitrary (though necessary) starting points. Rather, attention should be focused on the substantive Title I program development principles which are greatly in need of clear restatement.

These principles are the focus of this chapter. Though we have indicated that these principles have qualifications and particular interpretations and applications; they are the basic standards which LEAs must follow. An "anything goes" attitude infected the early days of Title I, and remnants of that era persist. New regulations should firmly set forth the fundamental program development principles which have evolved in OE documents over the past decade so that a clear basis for enforcing the law will be codified in one place.

Our recommendations for new regulations are the minimum standards necessary to enforce fundamental Title I principles. Contrasting existing state policies with our recommendations, we have found that for virtually every recommendation, there is a state in our survey that goes further than the recommendation and takes a more restrictive approach on the issue in question. With regard to the few recommendations not in that category, each implements a clear command of the existing legal framework and is supported by congruent policies in at least a minority of the states in our survey.

CHAPTER 4

NEEDS ASSESSMENT

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CHAPTER 4
NEEDS ASSESSMENT

In order to design programs "to meet the special educational needs" of the targeted children, as required by §141(a)(1), LEAs must know what those needs are. To find out, they must conduct a needs assessment. §116.18(b) of the regulations states that each LEA application must "provide an assessment of the special educational needs of the educationally deprived children who would be eligible to receive benefits."

I. Introduction

Needs assessment is a process of empirical inquiry and analysis having two major purposes. The first purpose is to generate data on which to base targeting decisions. To this end the needs assessment process gathers data to identify the children who are educationally deprived in general instructional areas and who have the greatest need in those subject areas. The second purpose of the needs assessment is to generate data on which to base program design decisions. For this purpose, the needs assessment discovers the incidence and severity of children's needs in greater detail. Also for this purpose, the needs assessment identifies needs in order of priority and discovers other factors contributing to children's learning problems.

Needs assessment is a continuous process that must constantly improve in accuracy and level of refinement. Once a Title I program begins, continuing needs assessment efforts, along with the results of on-going evaluations, lay a basis for more detailed planning of program sub-objectives, activities, and services and for the redesigning of programs in response to changed conditions.

The origins of these principles are discussed in the chapter on program development. They are treated as axioms here. This chapter discusses more detailed issues of needs assessment methodology, including federal materials and state policies on this subject and the analysis and recommendations of the Legal Standards Project. The body of this chapter is preceded by the next section which provides an overview of the issues and our recommendations.

II. Overview of Major Issues and Recommendations

This chapter discusses five needs assessment issues: 1) the level of specificity needs assessments must reach; 2) the assessment means that may be used; 3) the timing and frequency of needs assessment efforts; 4) SEA oversight mechanisms, and 5) the use of Title I funds to pay for needs assessments.

A. Level of Specificity

The level of specificity that must be reached in performing a needs assessment step depends on the purpose for which the step is done. For targeting purposes -- identification of educationally deprived children and those having the greatest need -- it is sufficient to discover achievement levels in general instructional areas. For program design purposes -- identification of the incidence, severity, contributing factors and relative priority of children's needs -- more detailed information is needed. After the Title I program begins, continuing needs assessment efforts must constantly become more accurate and refined.

We recommend that new Title I regulations expressly identify the levels of specificity that different needs assessment steps must reach -- achievement levels in general instructional areas for targeting purposes, achievement levels in components of those areas for program design purposes, and increasingly accurate individualized diagnostic profiles for continuing needs assessment purposes.

B. Assessment Means

A natural corollary to the principles just mentioned concerning needs assessment specificity is that different means are appropriate for different needs assessment purposes.

Objective means (rating scales, norm-referenced tests, criterion-referenced tests),subjective means (teacher, parent, student opinions), individually administered tests, group-oriented tests -- there are many different types of needs assessment tools. Each can probably make a useful contribution to a needs assessment; no one means, however, is suitable for all purposes.

Some means might not be valid even for the purposes for which they were designed. The validity of standardized tests, for example, is a subject of increasing controversy. Standardized tests are also being criticized for other reasons. Even if the technical validity of these tests is assumed (or, perhaps, proven), the process of administering them and difficulties in preventing misinterpretation or misuse of the results, may be harmful to children.

This is an area where the limits of our expertise do not allow us to make detailed recommendations. OE must not shirk responsibility for addressing these issues, however; they are too important. We recommend that new regulations include: 1) standards, illustrated with examples, concerning the types of needs assessment means appropriate for each needs assessment step; 2) clear indication that parent, teacher, and student opinions must be considered at appropriate points; 3) safeguards designed to detect invalidity, prevent misuse, and counteract or avoid other harmful consequences that may be associated with particular assessment devices.

C. Timing and Frequency

Needs assessment data used for targeting and initial program design purposes must be up to date. Once a Title I program begins, needs assessment efforts must be detailed and continuous.

We recommend that the regulatory provision which allows LEAs to rely on old needs assessments be withdrawn. The states in our survey overwhelmingly reject this option. Targeting and initial program design decisions must be made each year. Needs assessment steps on which those decisions are based should also be performed annually.

D. Oversight Mechanisms

Needs assessments must be documented. Some of this evidence must be submitted in LEA applications and the rest must be retained and available for inspection during SEA on-site visits.

We recommend that new Title I regulations establish standards defining the needs assessment documentation that LEAs must submit in their applications. We recommend that this information include: 1) the assessment means and procedures used for each needs assessment step; 2) for each targeted general group the number of children included in the needs assessment step and the number of children found to be achieving at each of several discrete attainment levels in each general instructional area, and 3) the assessment means and procedures to be used in continuing needs assessment efforts after the program begins, and the schedule for these activities.

We recommend that LEAs be required to retain in their records for each targeted general group, and each needs assessment step, the number of children included in that step, the date it was performed, the assessment means and procedures, and either 1) the number of children found to be achieving at each of several discrete attainment levels in each of the subjects assessed (for steps identifying educationally deprived children or measuring the incidence or severity of children's instructional needs), or 2) the number of children found to have a particular need (for steps discovering factors contributing to children's learning problems), 3) the number of children falling at each of several discrete points on any composite index used by an LEA to determine the children who have the greatest need for assistance (for steps determining the children having the greatest need), or 4) the order of priority of each need and the number of children found to have each need (for needs prioritization steps).

We also recommend that new regulations require SEAs to formulate on-site monitoring forms covering the full range of needs assessment information which LEAs are required to retain in their records and require SEAs to use those forms in a well-planned program of random on-site visits and follow-up visits which investigate the quality of LEA needs assessments as well as compliance with minimum legal standards.

E. Use of Title I Funds for Needs Assessments

Only educationally deprived children may receive Title I services; hence, Title I funds may not be used to assess general groups of children to determine which of them are educationally deprived. Title I funds may not supplant state or local funds or pay for services ordinarily provided with such funds; hence, Title I funds may not be used for needs assessment activities where they would supplant state or local needs assessment funds or where needs assessment activities are ordinarily provided with state or local funds. With these qualifications, Title I funds may be used to pay for other needs assessment activities. We recommend that new regulations expressly state these points.

The sections which follow discuss these subjects in greater detail.

III. Federal Documents, State Policies, Issues, and Recommendations

As we mentioned in the chapter on program development, OE has found that some states in our survey have in the recent past utilized virtually no empirical evidence of children's needs in making program development decisions, despite OE efforts stressing the necessity of needs assessments. We recommend that the Title I statute be amended to expressly include a needs assessment requirement. Such an amendment would emphasize the importance of needs assessments and would express Congressional support for needs assessment regulations.

Just stressing the importance of needs assessments, however, will not be enough. OE must set standards and procedures which will indicate specifically what LEAs must do to comply with the needs assessment requirement. The GAO Report, at 18, stated

> Although OE has stressed the importance of assessing needs, officials at six LEAs and five SEAs [out of 15 LEAs and 14 SEAs in the study] said they had received insufficient guidance from OE or the SEAs on how to make and document needs assessments.

At 21, the report indicates that OE has recognized the need for greater specificity in the needs assessment regulations and has promised

> that the proposed new Title I regulations . . . will outline the procedures to be used in documenting the educational needs of children more specifically than the current regulations.

Fulfilling this promise must be a top priority for OE; inadequate needs assessments threaten to undermine the very existence of Title I as a compensatory education program intended to meet the special educational needs of educationally deprived children.

In addition to the fundamental needs assessment issues discussed in the chapter on program development, the five subjects discussed in the following sections should be addressed in new Title I regulations.

A. Level of Specificity

The statutory and regulatory provisions which determine the level of specificity needs assessments must reach are discussed in the chapter on program development. Federal documents (also discussed in that chapter) expressly state the principles implicit in the statute and regulations, but the presentation of the relevant points in any one document is incomplete and, as a result, lacks credibility.

ESEA Title I: How It Works, at 17, states that for targeting purposes, identifying educationally deprived children, a single "key indicator" such as a standardized reading test is adequate. This document clearly states, moreover, that a needs assessment cannot end with such a general test and that LEAs must eventually start "pinpointing" needs and "diagnosing" educational problems. To do this, the document continues, LEAs must "consider the child as an individual, not as part of a group." This point is illustrated with the following example:

> For instance, school records may show a child has difficulty reading. In talking with the mother, a school official may find out the child often falls over things, misjudges distances, and so forth. Then a doctor may confirm that the child needs glasses and probably can't read without them.

Unfortunately, ESEA Title I: How It Works implies that LEAs must commence such an individualized, in-depth, diagnostic needs assessment immediately after the educationally deprived children are identified by the key indicator. The example clearly illustrates why individualized, diagnostic profiles are necessary, but to expect LEAs to immediately discover such individual needs for the thousands of children that may be identified by the key indicator is an unrealistic demand. A step has been left out; an intermediate level of needs assessment specificity and refinement should be reached first.

The step left out is supplied by Program Guide #44 and OE's Handbook on Title I Performance Objectives. Those documents identify the needs assessment efforts which must be made in order to formulate the initial design of the Title I program. As Program Guide #44 states, this is the stage at which

> The needs of the children . . . should be stated in behavioral terms and, when appropriate, with reference to objective measures of educational growth or achievement.

The illustrations in the performance objectives handbook indicate that the needs assessment at this point is concerned with the components of the general areas measured by the key indicator. The handbook adds that performance objectives incorporated in the initial design of a Title I program are never formulated for individual children, only for groups.

Thus, the individualized, diagnostic assessment described by ESEA Title I: How It Works comes much later. This point has not been adequately clarified. The performance objectives handbook concerns a narrow topic and does not provide the needed overview. Program Guide #44 offers its own unrealistic demand in this area -- a requirement that every conceivable general target group have its needs assessed in substantial detail; hence, its credibility on the issue of needs assessment specificity is as low as that of ESEA Title I: How It Works. Thus, despite the fact that all the relevant principles are stated somewhere they are never collected in a single document that is untainted by unrealistic expectations.

A few of the states in our survey have decoded the federal documents; these states have excellent policies which require assessment measures in general instructional areas for targeting purposes, more detailed assessments in components of those areas for program design purposes, and continuing efforts thereafter which generate individualized diagnostic profiles of increasing accuracy and precision.

The vast majority of states in our survey, however, have not gotten the message. LEA needs assessments in most states never come close to the level of specificity needed to design programs that are truly responsive to the particular needs of the targeted children. The level of specificity needed to adapt or modify an on-going program to meet the individual needs of participating children is also a realm unknown to most states' policies.

New regulations should correct this situation by untangling and reaffirming the principles already established in OE documents.

We recommend that new Title I regulations expressly identify the levels of specificity that different needs assessment steps must reach. New regulations should state that: 1) for targeting purposes -- identification of educationally deprived children and those having the greatest need -- it is sufficient to discover achievement levels in general instructional areas; 2) for initial program design purposes -- identification of the incidence, severity, contributing factors and relative priority of children's needs --

achievement determined in components of the general instructional areas (and comparably specific determinations with respect to the contributing factors to learning problems) must be the level of specificity reached; and 3) for purposes of modification, adaptation, and redesign of programs during implementation, LEAs must start to prepare increasingly accurate and precise, individualized diagnostic profiles of the participating children.

B. Assessment Means

Federal documents require that a wide variety of objective and subjective assessment means be utilized in conducting needs assessments, but the different means are only generally described and no indication is given as to the appropriate employment of alternative methods. For example, Program Guide #44 simply says that program planners should interview teachers, parents, and agency officials who know the children and should gather "information available on educational retardation, results of educational tests, linguistic or racial isolation, welfare and nutrition, physical and mental handicaps, and other pertinent information."

In the absence of more explicit federal guidance, several states have formulated their own policies concerning needs assessment means. In fact, this is the needs assessment issue receiving the most attention by the states in our survey.

Several factors highlighting differences among the states as to needs assessment methodologies can be identified. A basic consideration is whether the data gathered is primarily objective or subjective. With regard to objective data gathering, the type of measure used might be a test or a structured opinion survey such as a rating scale. If a test, the measuring device might be norm-referenced, or criterion-referenced. The use of classroom grades might reflect a combination of test and opinion information. (The opinion information reflected in grades may manifest varying degrees of subjectivity.)

Other significant methodological parameters are whether few or many techniques are used, whether the means are individualized or mass-administered, and whether the means are relatively direct or indirect measures of educational need or deprivation.

The policies of the states reveal differences with respect to each of these factors. All states in our survey encourage or require the utilization of objective measures to determine educational deprivation. Three states however, follow more flexible policies with respect to pre-school children. One of these urges LEAs to focus on "family history" in selecting participants for early childhood programs; another believes that most objective tests are not reliable assessment means for young children.

One state has recently abandoned reliance on a highly subjective means of determining educational deprivation -- teacher opinions as to which students have "serious deficiencies in verbal functioning". This action was taken in response to OE criticism of the practice.

In 1973, the SEA in one state in our survey found that most LEAs used only one measure to determine both educational deprivation and need. This was teacher opinion. Though the SEA now encourages use of objective measures, it still does not require LEAs to use them.

In another state, the SEA used to recommend that LEAs select one of seven criteria by which to determine educational deprivation. These ranged from the use of objective tests to reliance on the relatively subjective judgment of teachers. The SEA rescinded its policy after it found LEAs using all seven criteria rather than selecting one. This state now leaves the selection of means and criteria for determining educational deprivation to the discretion of its LEAs; objective measures, however, are particularly urged.

Six states in our survey require their LEAs to use norm-referenced achievement tests in determining educational deprivation. Three others allow any objective measures to be used, one of these indicating that teacher judgment can be structured so that it is objective, and another expressly stating that criterion-referenced tests may be substituted for norm-referenced tests.

One state in the majority of six has a policy which states that only standardized tests may be used to determine educational deprivation and assess needs (unless standardized tests are not available in a particular subject area). In another state in this group, no further assessment beyond standardized testing is required though diagnostic testing is suggested to LEAs that want to do more. SEA policies in the other states clearly contemplate the use of several objective and subjective measures in either determining educational deprivation or assessing needs. One state's policies expressly indicate that a needs assessment based solely on standardized tests is unacceptable.

Another factor for distinguishing among state needs assessment methodologies is the extent to which the assessment is individualized or group-oriented. Here, too, the variation among the states is significant. In two states, no individualization is required at all. In another, however, pupil evaluation teams established under the state special education law are used to screen each Title I student. In one state, the extent to which current procedures lead to the development of diagnostic, prescriptive instruction on an individualized basis is, itself, a subject of the needs assessment process. The SEA in another state urges school districts to develop their own assessment devices for individually determining needs.

In yet another state, group-oriented assessment means are most common, but these include teacher evaluations of individual students according to a structured rating scale or other evaluation device. Moreover, several different group-administered measures are used and the results for each student form an individual profile reflecting several factors. These profiles are used to identify the neediest children and determine program priorities.

Another methodological consideration is the extent to which state policies allow or require LEAs to employ assessment practices which either indicate need for Title I services only indirectly or which merely predict, rather than determine, the presence of need. In two states, poverty may be included in the needs assessment not merely as part of an inquiry into the factors contributing to educational deprivation or need, but as an independent indicator of educational need itself. (Though it may be an independent consideration, this factor is not dominant in the needs assessment policies of either of these states.)

A third state places great reliance on subjective analysis of a young child's family history as a means of predicting need for Title I services.

A fourth state prohibits consideration of IQ scores, while a fifth considers them an indicator on which substantial reliance may be placed. A sixth SEA reported that it would "question" but nonetheless allow the utilization of IQ scores.

In 1972, OE found one state's needs assessment policy to be one which led to the targeting of children based on mere prediction of "those unlikely to achieve at grade level". (OE urged that this practice be stopped.)

One state's statewide testing program tests all children and the results are used for Title I targeting and needs assessment purposes. In another state, each child in an eligible attendance area is included in Title I needs assessment testing. Officials in a third state, however, maintain that it would be "impossible" to test all students. In a fourth state, program participants consist of "those identified by the needs assessment or . . . students with the same needs" (emphasis added). Thus, only a sample of the potentially eligible population is assessed in making basic program decisions.

Many of these policies are not conducive to sound program development. Some are patently inconsistent with the Title I legal framework.

We recommend that new Title I regulations establish standards, illustrated with examples, concerning the types of needs assessment means appropriate for each needs assessment step. We lack the expertise necessary to make detailed recommendations in this regard; however, we are confident in urging acceptance of some basic principles. First, just as different needs assessment steps must reach different levels of specificity and refinement, different assessment means are appropriate for different steps; no one means can serve all purposes.

Second, at some point in the needs assessment process the most valuable information to gather next will be the views of a child's teachers and parents, the views of other persons who know the child and perhaps the views of the child, too. Subjective assessment means have as important a role to play in needs assessments as objective measuring instruments and new regulations should reflect this principle.

Third, use of assessment devices is accompanied by risks, and new regulations should include safeguards against them. A particular test, for example, might not be valid; it might be culturally biased; or it might not be an accurate indicator of what it purports to measure (and be equally irrelevant for use with different cultural groups).

A particular assessment device might be valid in a technical sense, but the process of administering it to children might be psychologically harmful. There is always the danger, moreover, that the results obtained through use of an assessment device will be misinterpreted or misused in harmful ways.

A significant number of states in our survey were highly critical of standardized tests. One condemned all subjective assessments. Different views of IQ tests were aired.

OE must consider the important questions of validity, misuse, and harmful side-effects associated with the different types of assessment means LEAs must use to meet their needs assessment obligations. Much uncertainty and, hence, controversy surrounds these issues. If the controversy were one of differing values it would be better left entirely to the states to resolve. But it is not; it is a matter in which technical uncertainty plays a major role. OE has more resources available to address such questions than the states do individually. Furthermore, the potential harm of leaving these issues totally unresolved is as great as the potential consequences of an initial wrong decision. In our view, OE should thoroughly explore these issues, and new Title I regulations should include safeguards designed to detect invalidity, prevent misuse, and counteract or avoid other harmful consequences that may be associated with particular assessment devices.

C. Time and Frequency

45 C.F.R. §116.18(b)(1976) states that LEAs may "incorporate by reference the assessment contained in a prior application"

in lieu of meeting the obligation to "provide" a needs assessment each year. Nearly all the states in our survey, however, either prohibit or discourage LEAs from using this option. Two SEAs reported that they do not allow LEAs to incorporate a prior year's needs assessment in lieu of a current one. A third requires its LEAs to "update" their needs assessments each year, but says that a "major" needs assessment does not have to be done annually. A fourth SEA indicated that it allowed its LEAs to rely on a prior year's needs assessment and that all LEAs had actually done so; nevertheless, that state's most recent application form implies that an annual needs assessment should be done.

In a fifth state, the SEA reported that needs assessments must be conducted on an annual basis but that LEAs were allowed to incorporate a previous year's assessment in the application. The SEA also reported, however, that it would question the inclusion of out of date figures and would not approve an LEA application based on such figures.

In a sixth state, needs assessments are to be done twice a year. The first needs assessment is submitted with the LEA application; it is an estimate of the needs of the children who will probably be served by the Title I program. The second needs assessment is submitted six months later; it is an assessment of the actual needs of the current program participants.

A seventh state expressly requires continuous needs assessments, thus implicitly rejecting reliance on out of date information.

Proper implementation of the "greatest need" standard requires current information. To be "best able" to meet children's needs, furthermore, a Title I program must be based on the most recent information identifying those needs. 144/ We recommend that new regulations reject the current regulatory language and expressly require LEAs to base their annual targeting and program design decisions on annual needs assessment efforts. Modification, adaptation, or redesign of on-going programs must then be based on continuous refinement of the annual needs assessments.

D. Oversight Mechanisms

§116.18 of the regulations states that each application "shall provide" a needs assessment. Program Guide #44, §2.1, strengthens this language by requiring SEAs to ensure that "the evidence of need and the bases for the assignment of priorities have been documented." The GAO Report, at 17, also noted the necessity of documenting needs.

> Without documented needs assessments, program managers do not have a proper basis for evaluating LEAs' efforts to meet children's needs.

144/ This is not to say that the only needs assessment information used should be information gathered after the needs assessment has commenced. Pre-existing data, including the results of Title I program evaluations, are undoubtedly useful. Furthermore, the utility of pre-existing information

The report noted, however, that several LEAs surveyed had not "documented the evidence used to establish the needs."

Federal documents offer no guidance concerning the needs assessment evidence which must be reported in LEA applications and that which can simply be retained and made available to SEA on-site monitoring teams. State policies in this area are divergent.

The application form in one state requires the following information: 1) grade levels assessed (no spaces are provided for dropouts or handicapped students); 2) number of students in each grade level assessed; 3) the general subject area in which needs were assessed (e.g., reading skills); 4) the method of assessment (instrument or strategy) used; 5) the month and year of the assessment; 6) the norm or standard adopted by the LEA as the educational deprivation cut-off score for each assessment method employed; 7) the number and percentage of children in each grade below the norm or standard; 8) subject priorities (ranked in order) for the Title I program; and 9) grade span priorities (ranked in order independently of the subject priorities).

The application form in a second state calls for similar information, but includes space for filling in the number of students with specified handicaps (e.g., deaf, crippled,

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is likely to be greater for some needs assessment purposes than others. For example, it may be that year-old data on educational deprivation of Title I program participants, combined with the results of a recent program evaluation, are sufficient to identify a large number of the educationally deprived children who should continue to be served. Year-old information, however, would probably be too outdated to use as the only basis for needs assessment steps requiring greater refinement. We are not experts in this area. New regulations should provide LEAs with adequate guidance on such questions.

mentally retarded, emotionally disturbed). Subject priorities are reported by eligible subgroup (e.g., elementary, junior high school, dropouts, and space is provided for indicating the number of program participants within each subgroup). (Note -- The priority needs of dropouts and the number of participants in other subgroups, such as neglected children and those who are culturally isolated, are included on the form; but the means used to assess the needs of enrolled students are the only assessment means that must be reported. Information as to the criteria used in deciding to target non-enrolled students is not required.)

The application form in a third state requires the reporting of data similar to that required in the first state (but including the "identified needs" of dropouts); the third state's application, however, includes space for general narrative responses by LEAs as to how needs assessment decisions were made and what categories of personnel were involved in making them (teachers, administrators, parents, community representatives, etc.).

The application form in a fourth state is similar to the third state's, but it includes a space for narrative description of an LEA's "plans for re-assessment of the critical needs," presumably at a later time. The SEA has also prepared several needs assessment work sheets to be used in preparing the application; these sheets must be maintained on file, but they are not submitted to the SEA.

The application form in a fifth state does not include needs assessment information (it does require information concerning actual participants), but the SEA requires LEAs to attach to their applications a report indicating the following: 1) that teachers, parents, private school representatives, and representatives of other agencies were consulted in determining needs; 2) that the needs have been documented; 3) that all subgroups (grade spans, dropouts, handicapped children, etc.) of potentially eligible children have been included in the needs assessment; 4) that needs have been prioritized; 5) that the previous year's evaluation was used in the needs assessment; 6) that supportive as well as instructional needs have been assessed; and 7) that supportive needs have been prioritized separately from instructional needs.

The needs assessment instructions for a sixth state's Comprehensive School Level Program Plan Form (used for Title I purposes) contain the following significant elements: 1) needs must be assessed with respect to eight mandatory program components -- reading, language development, mathematics, staff development, parent participation and community involvement, health/auxiliary services, multicultural education, and bilingual-cross-cultural education (in LEAs where an appreciable number of students do not live in homes where English is the primary language); 2) the needs assessment must identify the undesirable conditions, and their probable causes, which give rise to the educational needs addressed in the program; 3) the methods used to determine the conditions and causes must be described; and 4) instructional needs must be assessed on a component-by-component basis.

The application form in a seventh state requires that LEAs submit the number of children in each of the elementary grades who suffer from severe, slight, or moderate deprivation in various generally described instructional and auxiliary need areas (e.g., mathematics, vocabulary, nutrition, visual impairment). The measures used with respect to instructional needs must be identified, but no other information is required.

The application form in an eighth state requires no needs assessment information; the SEA, however, requires LEAs to attach a statement to the application form generally indicating the following: 1) the procedures used in analyzing needs; 2) a summary of the needs assessment data used and the way it supports the major conclusions of the needs assessment; and 3) the criteria for selecting participants for the Title I program.

As these brief descriptions indicate, LEA application form sections concerning needs assessment vary in different states from blanks for filling in test data to open-ended narratives for describing the needs assessment process. In many cases the blanks are scattered requests for information, rather than comprehensive inquiries. They focus on the results of the needs assessment and neglect questions as to the validity of the process employed. The instructions for the requested narratives do not generally highlight all the important needs assessment steps that should be discussed.

We recommend that new Title I regulations establish standards defining the needs assessment documentation that LEAs must submit in their applications. We recommend that this information include: 1) the assessment means and procedures used for each needs assessment step; 2) the number of children in each targeted general group, included in the needs assessment step, and the number of them found to be achieving at each of several discrete attainment levels in each general instructional area; and 3) the assessment means and procedures to be used in continuing needs assessment efforts after the program begins, and the schedule for these activities.

The number and variety of state policies concerning needs assessment evidence submitted on LEA applications are not matched by state policies on LEA needs assessment record-keeping. Two states require their LEAs to keep on file descriptions of the criteria and process used to identify the neediest students and to select the program participants.

In a third state, LEAs must keep their needs assessment "working papers" on file, and in a fourth, LEAs must maintain "documentation of the criticality of each need" addressed by the Title I program.

Policies such as these are insufficient in scope and specificity. LEAs should be required to retain records which demonstrate proper performance of each needs assessment step. Different records are needed for different needs assessment steps, though some common elements should be present in each.

We recommend that LEAs be required to retain in their records for each targeted general group, and each needs assessment step, the number of children included in that step, the date it was performed, and the assessment means and procedures used. Different additional information should also be included in the records, depending on the type of step. For steps identifying educationally deprived children or measuring the incidence or severity of children's instructional needs, the records should include the number of children found to be achieving at each of several discrete attainment levels in each of the subjects assessed. For steps determining the factors contributing to the children's learning problems, the records should include the number of children found to have each particular need discovered to be a causal factor.

For steps determining the children having the greatest need, the records should include the number of children falling at each of several discrete points on any composite index used by an LEA for this purpose (and a description of the component factors of the index and the method for combining them to form the index). For needs prioritization steps the records should include the order of priority of each need and the number of children found to have each need.

State monitoring forms used by SEAs when conducting on-site visits, like state record-keeping requirements, are generally incomplete. With two exceptions, state monitoring forms generally ask whether a few specific requirements were met and do not inquire into the quality of the needs assessment with any significant degree of rigor.

We recommend that new regulations require SEAs to implement well-planned programs of random on-site and follow-up visits to LEAs. These visits must be designed to investigate the quality of LEA needs assessments as well as compliance with minimum legal standards. To this end, SEAs should be required to formulate and utilize on-site monitoring forms covering the full range of needs assessment information which LEAs are required to retain in their records.

E. Use of Title I Funds for Needs Assessments

Four states in our survey maintain that since Title I funds may not be spent on ineligible children, no federal dollars may be spent for testing children to find out which ones are educationally deprived. Another four states view the matter as a supplanting issue, not a general aid issue. If an LEA does not already have a testing program, and if it has no immediate history of having one, these four states maintain that Title I funds may be used to initially identify the children who are eligible to participate. One state maintains that Title I funds may be used for all targeting and needs assessment testing.

New regulations should expressly clarify that both supplanting and general aid restrictions apply to the use of Title I funds for needs assessment purposes. Title I funds may not be used to assess general groups of children to determine which of them are educationally deprived. Neither may Title I funds be used for needs assessment activities where they would supplant state or local needs assessment funds or where needs assessment activities are ordinarily provided with state or local funds.

CHAPTER 5

ELIGIBILITY AND TARGETING OF CHILDREN

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CHAPTER 5
ELIGIBILITY AND TARGETING OF CHILDREN

While the Title I eligibility of school attendance areas is determined by a poverty standard (see Chapter 2), children within an eligible attendance area are eligible to participate in Title I programs if they are "educationally deprived" (§141(a)(1)(A) of the statute); family income is not a factor involved in determining the eligibility of individual children.

Title I has never been fully funded; thus, not all educationally deprived children can actually participate; LEAs must "target" some children and leave others unserved. (LEAs are prohibited by the concentration requirement from spreading the money thinly to serve all eligible children; see Chapter 7). Under §116.17(f) of the regulations, LEAs must select for participation those children who have the "greatest need".

I. Introduction

Many basic issues concerning targeting of children are discussed in Chapter 3 on program development; that discussion is not repeated here. The issues analyzed in this chapter, however, must be viewed in the context of the principles established in Chapter 3. The following paragraphs review these principles.

The concept of targeting refers to the decision as to which of the eligible children will actually participate in the Title I program. This decision has two components. The first is an initial decision as to which general groups of children (e.g., grades 1-6, dropouts, bilingual children, EMR or TMR children, etc.) will be targeted. The second component selects the particular children from each of the targeted groups who will actually participate in the Title I program.

The selection of general target groups may be based on value preferences. LEAs do not have to empirically determine whether one group has greater need than another; this component of the two-part targeting decision is necessarily judgmental. LEAs may consider educational theory as to whether, for example, targeting first-graders is likely to be more successful than targeting seventh-graders; or, they may consider empirical evidence of educational deprivation; but they are not required to enforce a mathematical formula or a particular standard of empiricism in deciding which groups to target.

The "greatest need" standard does apply to the second component of the targeting decision -- selection of the children within each targeted general group who will actually participate in the program. Within each group, children having the greatest need, as indicated by empirical evidence of their level of educational attainment, must be selected for participation prior to others in the group.

Resource constraints determine the total number of children who may participate. LEAs may divide available funds among target groups according to value preferences. Then, for each group, an LEA must estimate the maximum number of children that can be served with the funds allocated to that group. This estimate establishes a targeting criterion or cut-off point on the list of children ranked according to empirical evidence of their achievement levels. (The list does not have to name each child in order; it may merely indicate the number of children at each of several discrete achievement levels; the targeting cut-off point would then be an achievement level determined by the number of children at or below that level.) The maximum estimate may be revised downward after a needs assessment provides more detailed information from which the cost of the needed services can be more accurately estimated.

These principles are basic premises of the discussion in this chapter which concerns more detailed eligibility and targeting issues.

A. Overview of Major Issues and Recommendations

This chapter discusses five major subjects: 1) the meaning of "educationally deprived"; 2) interpretation of the greatest need standard; 3) the relationship of attendance area targeting to targeting of children; 4) continued targeting of prior program participants until they reach the achievement level appropriate for children of their age, and 5) standards for oversight mechanisms -- application approval, monitoring, and recordkeeping -- to ensure compliance with Title I targeting requirements. The Legal Standards Project offers recommendations in each of these areas.

1. The Meaning of "Educationally Deprived"

The current regulatory definition of the term "educationally deprived children" includes more than a standard for determining eligibility. The definition includes a statement of program purpose (raising achievement levels) and lists factors which may have caused the educational deprivation ("poverty, neglect, delinquency or cultural or linguistic isolation").

A definition should only explain a phrase and should not include other regulatory standards. We recommend that the definition of educationally deprived children be rewritten as follows:

> "Educationally deprived children" means children who are achieving at a level of educational attainment below that appropriate for children of their age. The term includes handicapped children.

This definition retains the concept that every child below the educational attainment level appropriate for children of her or his age is eligible; we recommend that new regulations not require children to be behind to any particular degree in order to be eligible. States that wish to serve only some of the children eligible under the recommended standard may establish their own targeting policies.

2. Interpretation of the Greatest Need Standard

The current regulatory language setting forth the greatest need standard utilizes the phrase "greatest need for assistance". The states in our survey have generally interpreted this phrase as referring to those children who are furthest behind grade level or who are in the lowest stanine or quartile. "Greatest need for assistance" is an inappropriate phrase for this concept; it could be misinterpreted as referring to children who are at or above grade level but functioning below their potential ability.

We recommend that OE amend the federal regulations, interpreting "greatest need" to mean "furthest behind", rather than "greatest need for assistance".

As explained in Chapter 3 on program development, we also recommend that new regulations expressly indicate that the greatest need standard does not apply to the selection of, or allocation of funds to, general target groups, but only to the selection of program participants within those groups.

3. The Relationship of Attendance Area Targeting to Targeting of Children

The current Title I legal framework offers inadequate guidance to LEAs regarding the relationship between targeting attendance areas having the highest concentration of children from low-income families and targeting children having the greatest need. LEAs in some states in our survey target every eligible attendance area and thus have sufficient funds only for the most severely educationally deprived children. LEAs in other states in our survey target only a few of the eligible attendance areas, thereby enabling them to serve all educationally deprived children in those schools.

We recommend that new regulations expressly allow LEAs to implement any consistent policy combining the two targeting requirements (attendance area targeting and targeting of educationally deprived children). New Title I regulations (or perhaps informal OE guidelines) should contain examples illustrating the full range of permissible alternative policies.

4. Continued Targeting of Prior Program Participants

The current language of the Title I legal framework implies that previous project participants whose achievement gains were not sufficient to bring them up to the grade level appropriate for their age, but were sufficient to move them out of the group that is furthest behind, may not continue to participate in the Title I program until children further behind, including those who are not prior participants, are served. This implication exists because compliance with §116.17 of the regulations -- which includes the "greatest need" provision -- must be demonstrated in each Title I application. Since Title I applications are submitted annually, the regulations imply that LEAs must make objective determinations of the children having the greatest need on an annual basis. The GAO Report, however, identifies OE's policy on this issue as one of requiring LEAs to continue serving prior project participants until they begin achieving at the grade level appropriate for their age (or until they leave the grade span in which Title I services are provided).

We recommend that OE add the following language to the existing regulations to expressly allow the retention of children in Title I programs until they are no longer educationally deprived:

> Children who are properly selected to receive Title I funded services may continue to receive services under Title I until they reach a level of educational achievement appropriate for children of their age or until they are passed to a grade in which Title I services are not available.

Similarly, we recommend that OE allow LEAs to give preferential treatment, for targeting purposes, to children who left the Title I program when they reached grade level but have since regressed. We recommend that this practice be permitted so that the financial investment in these children is not lost.

5. Standards for Oversight Mechanisms

Many state application forms elicit only limited and/or general information concerning eligibility and targeting of children, despite the need for SEA review in this area. We recommend that SEA application forms require, at a minimum, LEA information in the following three areas:

(1) number of eligible children by grade level or target group, and subject or handicap;

(2) number of participating children by grade level or target group, and subject or handicap;

(3) an explanation of the criteria used to select both eligible and participating children.

Many states have no specific recordkeeping requirements concerning eligibility and targeting of children. We recommend that each LEA be required, at a minimum, to maintain for each school the following records:

(1) a master list of eligible pupils by name, grade level or target group, subject or handicap, and degree of deprivation;

(2) a master list of participating children by name, grade level or target group, subject or handicap, and degree of deprivation;

(3) a list of the criteria and the staff process and screening procedures used in the identification of students for (1) and (2) above.

State monitoring instruments rarely address the specifics of compliance with the federal regulations concerning eligibility and targeting of children. We recommend that the federal regulations be amended to require the establishment of well-planned monitoring procedures which include utilization of monitoring forms designed to determine LEA compliance with each specific federal requirement concerning eligibility and targeting of children.

B. Organization of This Chapter

The issues and recommendations summarized above are discussed in greater detail in the body of this paper, which is divided into three major sections. The first section discusses eligibility issues, the second, targeting issues, and the third, oversight mechanisms.

Each section includes discussion of relevant federal standards contained in documents which are part of either the formal or informal Title I legal framework, state policies, the issues raised by these sources, and our recommendations for new Title I regulations.

II. Eligibility

The eligibility of school districts and school attendance areas to participate in programs under Title I is generally based on economic criteria, i.e., the number of children from low-income families residing in a school district and in a school attendance area, respectively. However, the purpose of Title I, as set forth in the Title I legislation is to provide financial assistance to LEAs to meet the special educational needs of educationally deprived children who reside in low-income areas. (§101 and §141(a)(1)(A) of the statute)

In other words, there are two criteria a child must meet to be eligible to participate in a program funded under Title I. First, the child must reside in a project area. Second, the child must be educationally deprived, regardless of the wealth of the child's family. (§116.17(f) of the regulations)

The basic rationale for serving educationally deprived children in low-income areas is Congressional recognition of the financial inability of the LEAs to support comprehensive programs to meet the special educational needs of such children.

A. Eligible Target Groups

In determining the eligibility of a school district to apply for Title I funds, only children between the ages of 5 and 17 from low-income families are included. However, the Title I statute (§101) expressly permits the designing of a Title I program for pre-school children. Similarly, Program Guide # 44 authorizes the use of Title I funds for dropouts. The OE handbook Title I ESEA: How It Works, at p. 14 adds that pre-school and dropout programs may be organized for youths up to the age limit prescribed by the state for receiving free public education.

In sum, once a school district complies with the minimum requirements respecting its eligibility to apply for Title I funds, it can design programs for any age group eligible to receive free public education under state law.

B. Eligible Individuals -- the Meaning of "Educationally Deprived"

The Title I statute does not define the term "educationally deprived". The term "educationally deprived children" is defined, however in §116.1(i) of the regulations as

> those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose need for such special educational assistance results from poverty, neglect, delinquency or cultural or linguistic isolation from the community at large.

Two significant features of this definition are, first, it contains extra language identifying program purposes and reciting factors that might be the causes of educational deprivation, and, second, it states that children who are achieving below the appropriate level to any extent are eligible.

1. Extra Language in the Definition

As presently written, the definition of educationally deprived children includes more than an explanation of who should be considered eligible to participate in Title I programs. The definition includes a statement of program purpose when it defines the children as those "who have need in order that their level of achievement may be raised." It also includes a listing of certain factors which may have caused the educational deprivation -- "poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large."

The statement of purpose should be part of the program design requirements set forth in the regulations. The identification of causal factors is better considered as part of LEA needs assessments. Causal factors should be considered in assessing needs and designing programs, not in determining who is educationally deprived.

We recommend that the definition of the term "educationally deprived children" be rewritten to read as follows:

> "Educationally deprived children" means children who are achieving at a level of educational attainment below that appropriate for children of their age. The term includes handicapped children.

2. Eligibility of All Children Who Are Behind

When asked whether the definition of educationally deprived children should be made more objective along the lines of the definition of educational disadvantagement used in Section 417 of GEPA, i.e., one or more years behind the achievement expected at the appropriate grade level for such children, most of the states in our survey responded in the negative. The needs assessment expert in one state explained that an LEA which had a philosophical bent toward early childhood education could argue, with substantial justification, that a first grader who is reading 3 months behind grade level is more educationally deprived than a twelfth grader reading at a sixth grade level.

Our survey confirmed the statement appearing at page 13 of Title I ESEA: How It Works that "most school districts consider a child educationally deprived if he is performing below the expected grade level for his age group." Some states added that such a determination must be made with respect to basic skills, i.e., reading, math, and language arts. In other words, most of the SEAs agreed with the definition of the term educationally deprived as including all children who are achieving behind the achievement expected at the appropriate grade level for such children, and they do not wish to see the meaning of the term narrowed any further.

Historically, there has been some confusion regarding the use of Title I funds for programs designed to meet the special educational needs of children who are scoring at or above grade level but below their individual ability. Today it appears that this confusion has been eliminated since all of the states included in our survey expressed the policy that Title I was not intended for such children.

In a 1972 letter to a Vista Volunteer in one of the states included in our survey, OE explained that although a child's potential, i.e., the fact that he/she is an under-achiever may be considered in determining whether such a child is educationally deprived for purposes of Title I, the "starting point for a Title I program is the identification of the children who are 'below grade' ". A related question concerns the use of IQ tests for determining eligibility. A 1975 OE Review Team, while visiting a state included in our survey discovered the use of IQ as a factor in eligibility and determined that such a practice was illegal. The report sent by OE was signed by the Director For the Division of Education For the Disadvantaged.

In responding to an LEA's application, the Title I Director in this state had explained that Title I is primarily for students below age or grade level expectancy and that "the selection of students to participate in Title I on the basis of their 'ability' as indicated on IQ tests is a questionable Title I procedure." However, he did not disallow it. During the interview, he indicated that the SEA would probably not challenge this practice. Two states in our survey have expressly prohibited the use of IQ data in determining the eligibility of children.

As we recommended in the chapter on program development, new regulations should expressly clarify that educational deprivation must be determined by empirical evidence of the achievement levels of children in the general instructional areas in which services will be offered. The definition of educationally deprived children we recommend above retains the concept that all those below the appropriate level are eligible. There is no need to lower this standard since states that wish to limit their programs to a more narrowly defined group of educationally deprived children can do so simply by implementing specific targeting policies.

Raising the standard to make eligible those performing above the grade level appropriate for their age would be inconsistent with the essential thrust of the Title I legal framework.

One state in our survey insists that the current standard of educational deprivation creates practical problems in schools where 80 percent or more of the children are eligible and 20 percent or less are not. We recommend that, rather than modifying a generally sound principle to eliminate a specific and relatively rare problem, new Title I regulations should address the problem separately as an exceptional case. This problem is discussed in the chapter on general aid.

III. Targeting

Since Title I has never been fully funded by Congress, it is generally the case that an LEA will be unable to serve all educationally deprived children. To assist LEAs in selecting project participants from among the eligible children, OE has promulgated the following regulation (§116.17(f)):

> The project for which an application for a grant is made by a local educational agency should be designed to meet the special educational needs of those educationally deprived children who have the greatest need for assistance.

The term "greatest need for assistance" is phrased broadly and has been the subject of substantial confusion. Federal documents have not clarified the circumstances or the manner in which this targeting standard applies. The handbook Title I ESEA: How It Works, at page 17, adds only that Title I funds must be used to help the "most needy" of the eligible children. The major questions are 1) does "greatest need" mean "furthest behind"; 2) does the greatest need standard apply to the selection of general target groups, or just individuals within those groups; 3) must the greatest need standard be uniformly applied throughout a school district, and 4) must program participants be removed from a Title I program the moment their progress moves them ahead of an unserved child because the latter child, at that moment, becomes a child having greater need?

A. The Meaning of Greatest Need

In setting forth the greatest need standard, the regulations use the phrase "greatest need for assistance" (emphasis added). This has created confusion. Many LEAs in the past have reasoned that those who need help most are not necessarily those who are furthest behind.

For example, an SEA in our survey reported that an LEA in a large urban area wanted to design a program under Title I for children in a high school who would not be able to attain admission to college without special help. Also, an OE Review Team reported in 1974

> Although the needs assessment provides a basis for the criteria for selection of educationally deprived children, actual practice discovered showed [sic] the selection of children in favor of those with more potential rather than those with the greatest educational deficiencies . . . . Children should be ranked sequentially . . . and selected in order of need, the greater to the lesser. Section 116.17(f)

It appears that the OE policy quoted above has filtered down to the states since all of the states included in our survey recognize the policy of targeting children who are furthest behind, and generally ignore potential for success. Thus, in response to the question, may Title I funds be used for a program which is advertised "First Come, First Served", all of the SEAs say such a program would be illegal since it targets children on the basis of motivation rather than degree of deprivation (the assumption is that the most highly motivated will be the first to sign up).

Nonetheless, new regulations should expressly clarify this point. We recommend that OE amend the federal regulations explaining that "greatest need for assistance" means "furthest behind".

B. Greatest Need -- Applicable to Target Group Selection or Just Selection of Individuals?

In addition to redefining greatest need to mean furthest behind, new regulations should expressly clarify one of the important principles discussed in the chapter on program development -- the greatest need standard does not apply to the selection of general target groups. Value preferences or educational theory as to the most promising point of intervention may be the basis for such decisions. Empirical evidence identifying those children furthest behind is necessary only for selecting program participants within each targeted group.

Unfortunately, Program Guide # 44 states that educational theory may be a basis for selecting general target groups in a way which confuses this point with the greatest need standard:

> Title I resources should be concentrated on those children who are most in need of special assistance. Normally this process will involve determinations of both the needs of individual groups of children and the possibilities of success in working with those groups [emphasis added].

If LEAs were required to target general groups on the basis of those that are furthest behind, Title I would have to be used to fully meet the needs of trainable and educable mentally retarded children before other groups' needs could be considered. OE, in discussing handicapped children, has indicated that this need not be done.

In 1972, OE issued Program Guide # 78 entitled, "Benefits for Handicapped Children in Local Public Schools under Title I, ESEA." The guideline is divided into two sections, the first section concerns states which have not passed mandatory special education legislation, the second section concerns states which have passed mandatory special education legislation.

With respect to states which have not passed mandatory special education legislation, the guideline provides that Title I funds may be used to fund, in whole or in part, special education programs for children residing in project areas. An implication from this guideline is that LEAs may, but are not required to target all special education children, although generally these children will be "furthest behind".

In those states which have passed mandatory special education legislation, the guideline provides that Title I funds may be provided for projects or components of projects "which extend beyond those required by law to be provided through state or local funds." In other words, the LEA may provide supplementary services, but in no case may supplant services provided under the special education legislation. Note once again that the language is directory, i.e., an LEA may, but is not required to provide supplementary services for handicapped children under Title I.

With respect to this specific issue, all the states in our survey understand that they are not required by the greatest need standard to serve trainable mentally retarded children either first, or at all.

Furthermore, the states in our survey have grasped the implications of this analysis for targeting other general groups. In most states in our survey, Title I services are limited to particular groups of potentially eligible children, without any attempt to empirically prove that the groups served have greater need than those that are not served. Several states encourage or require LEAs to focus on early elementary grades, based simply on the belief that it is important "to catch problems early."

In one state, for example, LEAs must focus on the youngest children unless they are granted a waiver by the SEA. This state affords LEAs four options for implementing this policy: 1) serving all children below the second quartile in achievement in grades K through x, where x is not greater than six; 2) serving all children below some designated percentile between the first and second quartile in grades K through x, where x is not greater than six; 3) serving all children below the first quartile in grades K through x, where x is not greater than six; 4) serving all children below the first quartile in grades K through six, then serving all children above the first quartile but below the second quartile in grades K through x, where x is not greater than six.

One state in our survey has a policy expressly implementing the suggestion in Program Guide # 44 that general groups be targeted according to estimations of the relative effectiveness of serving one group instead of another.

In fact, the major problem that has arisen from Program Guide # 44's confusion of this point with the greatest need standard is not the problem of LEAs feeling obliged to empirically prove one group to be needier than another. Rather, it is the problem discovered by the OE Review Team Report cited earlier -- the failure of LEAs to apply the greatest need standard to selection of children within general target groups.

New regulations should expressly clarify the proper interpretation of the greatest need standard.

C. Greatest Need -- District-Wide Uniformity Required?

Targeting of children and targeting of school attendance areas are parallel Title I requirements. Their relationship, however, has not been adequately clarified by OE.

Most of the states in our survey have policies which render the concept of attendance area targeting irrelevant. They require LEAs to establish an educational deprivation cut-off point and serve all the children below that level in all of the eligible attendance areas.

A policy rendering targeting of children irrelevant would be one which serves all of the eligible children in the few attendance areas having the highest concentrations of children from low-income families.

Between these two extremes lie a variety of possible combinations. Any uniform educational deprivation cut-off score could be set first with the number of attendance areas then determined automatically by the funds available and the number of children below the cut-off score in the attendance areas near the top of the list. Similarly, the number of attendance areas could be fixed and a uniform cut-off score could follow automatically or a different cut-off score could be determined for each targeted attendance area. In this last case, the cut-off score in a given attendance area would have to equal or be higher than that for all others further down on the list. (Otherwise, an LEA could, for example, serve a handful of children in each of the eligible areas except the one on the bottom of the list, where all eligible children would be served. This would be impermissible. Moreover, all instances where an attendance area has a higher cut-off score than an attendance area above it on the list are simply less extreme examples of the same impermissible practice[145/].)

Finally, an LEA could begin targeting with no fixed cut-off score or number of attendance areas in mind. If the cut-off score for a given attendance area were equal to, or greater than, those for attendance areas below it on the list, an LEA could claim that neither targeting requirement is violated by its strategy.

OE has not informed SEAs whether the analysis above is

[145/] This point is expressly mentioned in § 4.6 of Program Guide #44, the "proportionality provision", which states in part:

> The program in the areas with the highest incidence [of poverty] should be designed to serve a larger proportion of children and to provide them with a greater variety of services than programs in areas with lesser incidences of poverty.

correct. In our view, these principles are implicit in the existence of both an attendance area targeting requirement and a targeting of children requirement. Furthermore, a policy of concentrating efforts in particular schools may be as justifiable as a policy of serving all those in a school district below a uniform cut-off level. In different circumstances one policy may be preferable to the other.

We recommend that new regulations expressly indicate, with examples, the full range of options which are open to LEAs in meeting the two targeting requirements.

D. Targeting Prior Participants

One of the more important issues related to the meaning and scope of the term "greatest need for assistance" concerns whether children who are furthest behind grade level may remain in the Title I program even if after they show improvement, they are no longer furthest behind?

In other words, when is the LEA required to determine greatest need; at the time the child enters the program? Every six months? Annually? Every three years?

As the GAO Report explained:

> By interpreting the requirement to
> mean that a student must be among the

> most educationally deprived only at the time of entering the program, LEA officials can provide services until the student reaches grade level or is passed to a grade in which Title I services are not provided. However, by interpreting the requirement to mean that a student must always be among the most educationally deprived, he or she may be replaced by a student having a greater need before reaching grade level.

The statute as well as the existing federal regulations and guidelines are silent on this issue. However, it is possible to reach the conclusion that OE at one time required an annual determination of greatest need. This conclusion stems from a review of an HEWAA audit and OE's concurrence with the particular finding.

The auditors, in reviewing the policies and practices of one LEA discovered that the LEA was retaining all students in the Title I program for a minimum of three years, consistent with an SEA policy guideline.

The state's guidelines also required that all project participants remain in the program "until it can be substantiated that the participants will continue to work at or above grade level."

The HEW audit agency concluded that these policies contravened the "greatest need" requirement. OE in reviewing the these conclusions stated, "We concur with the auditors' findings and conclusions."

However, a directly contrary statement of OE policy appears in the recent GAO Report:

> OE will continue to work with the SEAs both through annual program reviews, and specific technical assistance visits to clarify even further the policy of providing Title I services to children identified through educational needs assessment as being in greatest need until such children are achieving at a level appropriate for their age or until they are passed to a grade in which Title I services are not available. . . (emphasis added).

Most of the states included in our survey interpret the "greatest need" language as OE originally did. Many, however, either follow their interpretation reluctantly or modify it to allow some retention of improving project participants.

In two states, the SEAs explained that a child who is improving can stay in the program for the entire year even if the child moves out of, for example, the lowest quartile. In a third state the SEA explained that a child could stay in the program during the next year for the purpose of preventing recidivism.

The Title I Director in a fourth state said that so long as a child remained on the borderline of the targeting criterion, the child could remain in the program.

One state, in response to an LEA question said it is unfair to remove a child from a Title I program before he/she reached grade level.

> Although the law provides that the children with the greatest needs be accommodated in Title I, there is the underlying fact that children who were in the program in previous years may have a lesser need to participate than one who's new to the program.
>
> However, in all fairness to the child who has been in the program, wouldn't it be unfair to return him to the mainstream of the school district's program before he has reached his grade level expectancy?

The SEA suggested a possible interpretation of the existing Title I legal framework which would permit such a policy.

> The space available concept, not new to Title I, does allow on a space available basis, and at no additional expense to the school district, additional children to be included in the program.

A question which is related to the continuity issue is whether a formerly successful Title I student who has since regressed, but not to the cut-off point, may nonetheless be designated a project participant in order to prevent further regression. Most of the states said no, but two said they would allow LEAs discretion to offer such a child special treatment.

It is our opinion that the existing legal requirements support OE's original position on this issue. The present structure of §116.17 of Title 45 of the Code of Federal Regulations, which includes at paragraph (f) the "greatest need" provision is based on the Title I application, which is submitted annually. Therefore, it would appear that the LEA must make the determination of which children are in greatest need on an annual basis.

From a policy standpoint, however, there is merit in OE's current position, as indicated in the GAO Report.

We recommend that OE add the following language to the existing regulations:

> Children who are properly selected to receive Title I funded services may continue to receive services under Title I until they reach a level of educational achievement appropriate for children of their age or until they are passed to a grade in which Title I services are not available.

E. Standards for Oversight Mechanisms

Federal regulations (45 C.F.R. §116.34(a)) direct the

SEAs to review LEA applications in order to determine if LEAs are effectively meeting Title I requirements. Current federal regulations (45 C.F.R. §100(b)(431)) also require SEAs to "constantly monitor performance" of Title I activities to assure adequate progress "toward achieving the goals of the grant." Furthermore, monitoring must be done for "each function or activity of each grant." Generally speaking, this translates into SEA on-site review. In a related area, 45 C.F.R. §116.23 permits the SEA to direct LEA recordkeeping as it deems "necessary" to assure the accuracy of LEA reports.

Set forth below is a summary of the range of information solicited by various application forms. The first nine items concern the estimated number of eligible and participating students. This information is used to determine, among other things, compliance with the concentration requirements and the no-skip requirement; it also provides information related to LEA grade span and subject area priorities. The last three items concern the selection criteria, standards, and methodologies employed in the selection process.

Estimated Number of Eligible Students

1. Total for the school district by grade level.
2. Total for each project area school by grade level and instructional component residing in a project area.
3. Total for each project area school by grade level and instructional component not residing in a project area.
4. Total for the school district who are handicapped.

Estimated Number of Participating Students

5. Total for the school district by grade level.
6. Total for each project area school by grade level and instructional component residing in a project area.
7. Total for each project area school by grade level and instructional component not residing in a project area.
8. Total participating in the instructional component receiving supportive services.
9. Total for the school district who are handicapped.

Standards for Selecting Children

10. A description of the criteria used for determining eligibility, i.e., who is to be considered educationally disadvantaged.
11. A description of the criteria used for determining which children are to be designated project participants, i.e., which children have the greatest need for assistance. For example, the percentile or grade level equivalency used as cut-off points.
12. A description of the methods used, including a listing of standardized tests selected or if standardized tests not employed, the reasons why and a statement of the standards for selection chosen.

Although this composite listing of application information would be sufficiently detailed for proper SEA oversight, many states limit their inquiry to two or three of the twelve listed areas. No state application form contains all of the above inquiries; some states require as few as one. For example, some state application forms merely request information concerning the eligibility of children, thus omitting the targeting of children as a factor in the application process.

Few SEA application review checklists address eligibility and targeting of children. One state checklist which does, merely asks whether "methods of selection have been indicated." Another state requires an indication that criteria are "specific enough so that there is no doubt as to who will be chosen to participate in the program." More detailed review questions than these are not formally indicated.

A similar situation prevails with respect to SEA monitoring and recordkeeping policies. Judged as an aggregate, the policies contain provisions that are adequate for the performance of SEA oversight obligations. Few policies, if any, however, reflect the comprehensiveness of the aggregate.

The state monitoring instruments and recordkeeping requirements differ in their scope and range; they fall in several categories.

First, there are states which merely solicit general conclusions in their monitoring instruments, without identifying specific aspects of the eligibility and targeting requirements. For example, one state instrument asks whether

> the Title I program is based on a consideration of the relative needs of children at all ages and grade levels and is designed to meet a limited number of high priority needs which cannot be met through the regular school program.

In contrast, a second group of states solicits compliance with specific aspects of the federal regulations. A composite list of sample questions is set forth below.

1. Evidence is available to confirm that the selection of children to participate in the Title I program is based on educationally sound selection criteria for a compensatory education program, i.e., below the third stanine or below the twenty-fifth percentile.

2. Title I target children (educationally disadvantaged) are placed in Title I supplementary educational programs without regard to race.

3. The school at the top of the list served all of the children who meet the district-wide criteria for participation in the #1 program priority before moving to the second school on the list. The same procedure was followed for each additional program priority.

4. "Do all students assigned to remedial classrooms meet Title I educationally deprived requirements?

They must be behind 2 months times grade placement in each subject in which they are receiving instruction (placement in Title I classes may not be determined by expectancy based on IQ. The state reading formula is not used for placement in Title I classes).

5. Are all students assigned to Title I classes functioning at a level above that established in the district for assignment to special classes for educable mentally retarded students?

6. The number of children participating in each activity is in conformity with the approved application.

7. Only eligible children are being served by the project.

8. Have eligible students been scheduled into Title I classes?

9. When did eligible students begin classes with the Title I staff?

10. All participating students are eligible under the guidelines.

11. Participation of educationally deprived children residing outside the project area does not dilute the effectiveness of the project with respect to children residing in the project area. (Comment)

12. Eligible participants are those students who have been identified as below grade level in reading, language arts, or mathematics and who reside in eligible areas.

13. Children are not denied the opportunity to participate in the project on the grounds that they are not children from low-income families or on the grounds that they are not attending school at the time (§116.17(f)).

A final group of states monitors LEA compliance by focusing on LEA records and documentation. Specific recordkeeping requirements are generally indicated in the SEA monitoring instruments. For example, one state monitoring instrument lists the following questions with a primary emphasis on LEA documentation and compliance.

PARTICIPANTS AND SERVICES

1. Does adequate documentation exist for the following items? Review documentation for items a and b.
    a. The number of educationally deprived children in eligible attendance areas (test data, list of eligibles, list of participants, any other pertinent information)
    b. The high priority needs of the educationally deprived (needs assessment data)
2. Does this documentation include private school students as well as public school students?
3. Does a systematic procedure exist for conducting a needs assessment?
4. Do the services provided correspond to the documented needs of public school children?

    Of private school children?
5. Does evidence exist to show that private school representatives (such as superintendent, principals, teachers, and parents) were adequately consulted in determining the needs of and types of services for private school children?
6. Is there a clear relationship between the results of the testing and the design of the Title I program?

7. Does testing data support the selection criteria and is the participation by those with the greatest need for assistance?

8. Is there evidence of a serious effort to identify and analyze the educationally deprived child's needs?

9. List the items in this section in which the LEA needs assistance and/or improvement and comment on those items above which need further clarification.[146]

Other state recordkeeping requirements are less extensive, though perhaps more specific in nature. A sampling of such requirements is set forth below.

1. A master list is available in which eligible pupils are clearly identified by name, grade level, subject or handicap, and degree of deprivation.

2. There is on file a current ranked ordered list of eligible participating children.

3. Each principal has on record the list of criteria and a description of the staff process and screening procedures used in the identification and selection of students with the greatest education needs.

4. The principal has on file a master list of eligible students which also includes the criteria for those students selected for participation in the Title I project.

5. Each staff person in the Title I project has a corresponding list of students eligible to participate in their respective Title I academic activities and/or supportive services.

6. The above lists correspond with the student numbers and grade levels found in the approved application.

146/ Note that several of the above questions are taken from the HEW handbook, Title I, ESEA Conducting On-Site Visits.

We recommend that new Title I regulations expressly set standards identifying the eligibility and targeting information SEAs must check in performing their oversight duties.

We recommend that SEA application forms require, at a minimum, LEA information in the following three areas:

1) number of eligible children by grade level or target group, and subject or handicap;
2) number of participating children by grade level or target group, and subject or handicap;
3) an explanation of the criteria used to select both eligible and participating children.

We recommend that each LEA be required, at a minimum, to maintain for each school the following records:

1) a master list of eligible pupils by name, grade level or target group, subject or handicap, and degree of deprivation;
2) a master list of participating children by name, grade level or target group, subject or handicap, and degree of deprivation;
3) a list of criteria and the staff process and screening procedures used in the identification and selection of students for 1) and 2) above.

Finally, we recommend that the federal regulations be amended to require the establishment of well-planned monitoring procedures which include utilization of monitoring forms designed to determine LEA compliance with each specific federal requirement concerning eligibility and targeting of children.

CHAPTER 6

PROGRAM DESIGN

CHAPTER 6
PROGRAM DESIGN

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CHAPTER 6
PROGRAM DESIGN

Section 141(a)(1) of Title I requires that Title I funds be used for "programs and projects." Programs and projects must be "designed to meet the special educational needs of educationally deprived children." The program design requirement is an essential feature of Title I. Compliance with many of the other specific requirements of Title I -- such as the no-supplanting, concentration, and evaluation requirements -- depends upon the formulation of clearly defined Title I projects.

I. Introduction

Program design is one of the three components of the program development process. The other two components are targeting of children and needs assessment. Program design is the process of deciding the objectives and subobjectives to which the Title I program will be directed and the activities that will be pursued or the services provided. Objectives are the ends to be accomplished by a Title I project; the activities or services are the means designed to attain the objectives.

Like the chapters on targeting of children and needs assessment, this chapter is directly based on several principles established in the chapter on program development. The following paragraphs review some of these principles. Others are mentioned at points in the body of this chapter.

One of the initial steps of the program development process is the program design step which determines the general instructional areas -- reading, language arts, mathematics, etc. -- on which an LEA will focus its program.

This is an essential premise of the needs assessment. The assessment of instructional needs may be limited to the selected general areas. If an LEA decides to provide instructional services only in reading and language arts, no assessment of mathematics needs is necessary.

The selection of general instructional areas must reflect emphasis on basic instructional needs, but the selection of particular general instructional areas may be based on value preferences. Program planners may implement their own theories concerning the relative priority of general areas or attempt to gather empirical data as to whether, for example, reading is needed more than mathematics; but program planners need not justify their selection of general instructional areas in such terms.

They must, however, make sure that the number of areas selected is within the limitations imposed by resource constraints. At the same time, program planners must ensure that the focus of the program is not so limited that important general instructional areas, deficiencies in which may be factors contributing to children's learning problems, are overlooked.

The other two program design steps are performed only after the targeting and needs assessment processes are completed. The first of these steps decides the objectives and subobjectives of a Title I program.

A general objective for each general instructional area must be formulated. Subobjectives for each objective must then be established. The subobjectives for any one objective must, as a group, span the full scope of the objective in such a way that failure to attain the objective is likely to be traceable to failure to accomplish one or more of the subobjectives. Subobjectives must be sufficiently numerous and specific to be responsive to the particular needs discovered in a detailed, in-depth needs assessment.

Once the objectives and subobjectives are established, an LEA must decide which activities and services (instructional and non-instructional) are necessary, sufficient, and best able to accomplish those ends. Since programs which address underlying factors contributing to learning problems will be more successful than superficial efforts directed only at immediate symptoms, this program design step must be based on the results of the needs assessment step which analyzes these factors. Educational theory -- particularly lessons from evaluations of past Title I activities and services -- must supplement the empirical search for contributing factors. Both types of input must be effectively utilized so that the most promising program can be designed.

Resource constraints necessarily limit the extent to which activities and services can be provided to the program participants, but the primary impact of resource constraints must fall on the number of participants selected to participate and the number of general instructional areas selected for emphasis. Participants and general instructional areas must be limited so that sufficient funds are available to provide all the activities and services which will ensure each program participant a fully adequate opportunity to accomplish the established objectives. Title I requires LEAs to provide ample activities and services to a limited number of children in a limited number of general instructional areas, rather than to offer inadequate and diffuse services or activities to a larger number of children.

Once a Title I program begins, continuing needs assessment efforts and on-going evaluation activities provide the basis for more detailed formulation of project subobjectives, activities and services. Needed changes in previous plans must be made as well; program design and redesign is continuous.

A. Overview of Major Issues and Recommendations

This chapter builds on the basic program design principles established in the chapter on program development; it discusses more detailed program design issues. The following paragraphs summarize the most important issues, as well as our recommendations for new regulations.

A major question concerns the restrictiveness of the Title I program design requirements. Several states believe that the Title I legal framework either requires, encourages, or restricts the design of projects employing particular strategies (e.g., "in-class" programs or "pull-out programs).

New regulations should clearly indicate that Title I does not require any particular instructional strategy. OE should prepare several program models having alternative formats, ranging from 100% pull-out to 100% in-class. The model programs should clearly inform LEAs of the precise interpretations of Title I legal provisions which make each of the alternative models a permissible design. This recommendation is also urged in the chapter on supplanting.

The "size, scope and quality" of Title I programs are express statutory concerns. These words are important Title I legal standards governing program design. The first concerns the concentration of Title I services (discussed in the chapter on that requirement), the second concerns provision of a balanced variety of services coordinated with the regular school program, the third, over-all likelihood of program success.

Regarding the "scope" of Title I projects, Program Guides #44 and 48 indicate that projects must be designed to provide a balanced variety of services coordinated with the regular school program so that all factors contributing to the learning problems of children are addressed. New regulations should expressly incorporate this requirement.

The Title I "quality" requirement must also be enforced. The federal legal framework leaves the initiative in this area to the states, but this initiative must be taken. The federal documents set only minimum standards; thus, the states must initiate policies that will meet and exceed the federal standards, enabling Title I programs to reach high, not just minimum, standards of quality.

State policies have, in general, not comprehensively addressed all of the issues relevant to ensuring high quality programs. Despite the inadequacy of state policies in this regard, we do not recommend that federal regulations set new substantive standards implementing one concept of a high quality program. Rather, we recommend that new regulations expressly identify the issues which SEAs must address and expressly require SEAs to prepare program design handbooks which set procedural and substantive standards facilitating the design of high quality programs. Procedural standards should concern such issues as the persons involved in program planning, utilization of research and evaluation information, and the order in which program design decisions must be made. Substantive standards should concern such issues as staff qualifications, organization, and training, the adaptability of services to meet individual needs, and the specificity with which activities are planned.

Our recommendations concerning the three major issues discussed thus far -- the restrictiveness of the legal framework, the scope of Title I programs, and program quality -- are the most important recommendations in this chapter. Several other matters, however, are also in need of attention.

The basic principles stated in OE's Handbook on Performance Objectives should be incorporated in new regulations. New regulations should require with respect to one element of performance objectives--the level of attainment children will attempt to reach--that objectives be written so that, if the children accomplish them, they will start overcoming their educational deprivation, rather than just remaining equally behind, or falling further behind, their colleagues in the regular program. With respect to another element of performance objectives -- the children expected to accomplish the objective -- new regulations should require objectives which all participants, not just a designated percentage, are intended to reach. (One exception to this principle is noted later.)

The body of this chapter discusses these issues and recommendations in greater detail; this discussion includes analysis of federal documents and relevant examples of state policies. The next section explains the topical organization of this chapter.

B. The Organization of This Chapter

Section II of this Chapter introduces the basic legal requirement that Title I funds be spent on discrete projects. Section III discusses the elements of performance objectives; performance objectives are necessary parts of the Title I concept of a project. Section IV analyzes the program "scope" requirement; the essence of this requirement concerns the need to provide a balanced variety of services coordinated with an LEA's regular program. Section V discusses the program "quality" requirement. This is the longest section; it embraces staff qualifications, organization, and training; persons involved in program planning; the procedural order of program design decisions; the utilization of educational research information; the utilization of evaluations of past Title I programs; and the adaptability of Title I services to the individual needs of program participants. Section VI concludes the chapter with a discussion of standards for SEA oversight mechanisms -- application approval, monitoring, and recordkeeping.

II. The "Project" Requirement

In enacting Title I, Congress determined that this statute should not establish a general-aid-to-education program.

Thus, Title I funds must be spent for discrete projects. Projects must be specifically designed to meet three statutory criteria. First, projects must be of "sufficient size" so that the project participants receive concentrated services. (This issue is discussed in the paper under concentration.) Second, Title I projects must be of "sufficient scope" to provide a balanced variety of services so that all the contributing factors of children's learning problems may be successfully addressed. Third, Title I projects must be of "sufficient quality" to be successful compensatory education programs.

The statutory requirement that Title I funds be used for "programs and projects" is implemented by 45 C.F.R. §116.17(a) (1975):

> An application for a grant . . . *shall set forth a project* for educationally deprived children . . . which . . . *shall have been designed* specifically to meet special educational needs of those educationally deprived children. [Emphasis added.]

The Title I regulations do not expressly define the term "project." Implicitly, however, the Title I legal framework identifies the two major components of projects. These are, first, performance objectives and, second, activities or services specifically designed to accomplish the performance objectives.

The Title I legal framework mentions objectives in several places. Section 141(a)(7) of the Act, a provision concerning evaluation reports, indicates that these reports must be "related to program objectives." Section 116.1(a) of the regulations requires that each Title I application "describe the objectives of the project" proposed for funding.

The Title I legal framework indicates that the objectives of Title I projects must be of a particular kind. They must be performance objectives. Section 141(a)(6) of the Act states that projects must be designed to include "objective measurements of educational achievement." Section 141(a)(7) of the Act requires evaluation reports "relating to performance" which must be "in accordance with specific performance criteria related to program objectives."

The second major component of Title I projects -- activities or services designed to accomplish the performance objectives -- is mentioned in the regulations implementing the GEPA. 45 C.F.R. §100.1 defines the term "project" as "an activity or set of activities designed to meet the purposes of the applicable Federal program."

Though the two major components of Title I projects are expressly identified by the Title I legal framework, the provisions which do so are scattered throughout the statute and regulations. We recommend that the Title I regulations be amended to include a definition of the term, "project" which expressly identifies their two major components as, first, performance objectives and second, activities or services specifically designed to meet those objectives. In addition to identifying the two major components of Title I projects, the definition should distinguish projects from programs, indicating that the term "program" refers to an LEA's total Title I expenditures and that an LEA's program is composed of projects.

III. Performance Objectives

OE's Handbook on Performance Objectives identifies the four elements of performance objectives. The first element concerns the persons whose performance will be determined:

> A performance objective should describe or name the person(s) to whom the activity is addressed. This is the first characteristic of a performance objective. To illustrate, in a Title I program the persons may be 100 first grade children who cannot speak English or 35 migrant children or 75 high school dropouts or 160 eighth grade children reading 2 or more years below grade level or all fourth graders whose reading rate of gain was less than 0.5 during the previous year.

The second element of performance objectives identifies "the behavior or action" which is to be demonstrated:

> The behavior or action is specified by action verbs such as write, formulate, compute, describe, identify, construct, add, subtract.

The third element of performance objectives identifies the conditions under which the behavior or action will be performed. Essentially, the conditions are the tests or other means used to determine the extent to which an objective has been attained.

> *When presented with 10 problems in addition*, all children in the project will correctly solve them as a demonstration of their acquired skill. *When presented with 10 problems in addition*, is the condition under which the children will be performing the activity. [Emphasis in original.]

The fourth element of performance objectives specifies the level of performance the students are expected to achieve. In the example above, correct solution of all 10 addition problems is the level of performance expected.

The formal Title I legal framework does not expressly identify these four elements of performance objectives. As the paragraphs which follow indicate, however, the formal legal framework does set forth several standards implicitly governing them. Moreover, many critical program design issues concern one or more of these elements. Consequently, we recommend that the Title I regulations be amended to include a definition of performance objectives expressly mentioning each of their four elements.

A. Persons Affected: The First Element

Other than the targeting provisions which require project participants to be educationally deprived children having the greatest need, the Title I legal framework does not include express standards regarding the persons for whom performance objectives must be written. In the absence of express guidance, a major issue has arisen on which the states in our study are divided. This is the question of whether performance objectives must apply to all participants in the project or to only a designated percentage of them.

In three states, the SEA does not require that performance objectives apply to all students in a Title I project. An example attached to one state's application instructions, lists a program objective for 70% of the students. In a fourth state, the SEA encourages but does not require LEAs to list performance objectives for 100% of the project children. In three other states, however, LEAs must write objectives applicable to all of the children in the Title I program.

In our view, only the policies of these last three states are consistent with the requirement that Title I projects be designed to serve the children who are greatest in need. Since the children who fail in a program designed to successfully serve only a portion of its participants are, by definition, children having a greater need than those who succeed, standards which allow LEAs to ignore the failure of an "acceptably small" number of participants are inconsistent with the Title I legal framework.[147]

The Title I legal framework should be amended to expressly provide that performance objectives be written in such a way that they apply to all participants in a Title I project. In light of the policies of some states, this amendment is necessary to ensure that Title I projects are designed to serve the children having the greatest need and not merely those who have the greatest chance for success. One exception to this requirement should be allowed; it should concern project objectives having both of the following characteristics:

(1) the objective is an interim objective;

147/ The issue of whether performance objectives are written to apply to all participants in a Title I project is related to, but distinct from, the issue of the substantive standards of success established by the objectives. One way to effectively defeat the requirement that performance objectives apply to all participants would be to establish substantive performance standards so low that success by all is virtually guaranteed. The legal framework prohibits this kind of evasive practice. (See the section on "Level of Performance: the Fourth Element," *infra*.)

> that is, an objective designed to be reached part way through, rather than at the end of a Title I project;
>
> (2) the accomplishment of the objective by a portion of the Title I project participants leads to a refocusing of Title I resources on services for the children in the project who did not accomplish the objective.

Thus, interim objectives triggering greater concentration of resources on those greatest in need should be allowed and, in fact, encouraged.

B. The Type of Behavior Expected: The Second Element

Program Guide # 44 expressly identifies the second element of performance objectives:

> The compensatory education objectives to be met through Title I should be clearly . . . stated in terms of the types of changes that are sought.

The reference to "types of changes", however, is imprecise and inconsistent with the OE Handbook on Performance Objectives. The proper phrase is "types of behavior", and we recommend that the formal legal framework be amended to reflect the language of the OE handbook.

Other provisions of the formal legal framework establish standards governing the types of behavior that should be incorporated in Title I performance objectives. In general these standards concern either the subject areas or the scope of Title I performance objectives.

Section 116.18(b) of the Title I regulations states that Title I applications must "describe" project objectives "in relation to" the special educational needs identified in the needs assessment. This provision indicates that Title I project objectives must be based on the needs assessment. This point is a basic principle established in the chapter on program development. We recommend, however, that the regulations be amended to express this requirement more directly. Section 116.18(b) states that the project objectives must be described "in relation to" the needs assessment but does not expressly state a requirement as to what that relationship must be. New regulations should state that project applications must describe project objectives which if accomplished will meet the needs identified in the needs assessment. Thus, the "types of behavior" reflected in Title I performance objectives must be the types of behavior which will indicate that children's needs are being met.

Two other fundamental principles concerning the subjects and scope of Title I performance objectives are presented in the program development chapter. First, only educational attainment objectives can be independent ends of a Title I project. Motivational or attitudinal changes are important supporting objectives, but not ends in themselves.

Second, LEAs must formulate two types of performance objectives. The first type must have a general scope; one such objective should be written for each general instructional area (e.g., reading, mathematics, or language arts). The second type of objective -- we recommend they be called subobjectives -- must have a narrower scope and must be written for each activity to be undertaken in pursuit of a general objective.

C. Performance Conditions: The Third Element

The formal Title I legal framework includes two major standards governing the means for determining whether an objective has been accomplished. The first is the requirement that Title I projects be evaluated by "objective measurements." The requirement of objective measurements is specified in several parts of the Act and regulations, including §141(a)(6) of the statute and §116.22(a) of the regulations. §151(g) of the statute is the most significant provision in this regard since it requires that Title I evaluations be "based to the maximum extent possible on objective measurements."

A second standard governing performance conditions is the requirement of §151(d) of the Act which requires that LEAs use "uniform procedures and criteria" in the evaluation of the Title I programs. Under the statute the uniform procedures and criteria are to be formulated by HEW.

We recommend that the first standard -- the requirement of objective measurements -- be applied to both general performance objectives formulated for each general instructional area and the more specific subobjectives formulated to span the scope of the objectives and guide program activity decisions. This recommendation is a clarification of, rather than a change in, the current legal framework. (The current legal framework already imposes a requirement of objective measurements for all performance objectives. Program Guide # 44 states that the performance objectives include those for "each major activity" in a given general instructional area.)

The current Title I legal framework does not explain the term "objective measurements". In the absence of express guidance, some states have interpreted the term restrictively.

We recommend that new Title I regulations expressly identify the full range of assessment mechanisms that are contemplated by the term "objective measurements". The regulations should list numerous examples and contain a standard for determining the circumstances under which assessment devices such as teacher rating scales will be deemed to be objective or subjective. (This point is discussed more fully in the chapter on evaluation.)

We recommend with regard to the second standard -- the uniform procedures requirement -- that new regulations interpret §151 as applying only to general performance objectives formulated for each general instructional area. Since subobjectives should be specific and should vary from LEA to LEA according to individual needs assessments, it would be inappropriate to require nationally uniform procedures and criteria for measuring attainment of performance subobjectives. This recommendation is entirely consistent with the existing language of §151 of the Act and requires no change in the statute. (The uniform measurement of objectives in general instructional areas is all the statute requires.) Though both of the above recommendations are clarifications rather than substantive changes, we recommend that new regulations include language which expressly reflects these two points.

D. Level of Performance: The Fourth Element

The current Title I legal framework includes several provisions setting standards governing the level of performance appropriate for Title I performance objectives.

§ 141(a)(1) of the statute says that projects must be designed "to give reasonable promise of substantial progress" toward meeting the needs of educationally deprived children. The definition of educationally deprived children in §116.1(i) of the regulations indicates that Title I programs must be designed to raise the educational attainment of project participants to a level "appropriate for children of their age." §116.18(e) states that Title I projects must "give reasonable promise of promoting to a marked degree improvement in the educational attainment . . . of children."

§ 4.3 of Program Guide # 44 indicates that although performance objectives should be "realistically stated," they should be formulated so that the program "if executed as planned, will very likely result in reduction in educational deficiency."

These provisions clearly indicate (though in different terms) that Title I performance objectives should set a level of performance high enough so that if the objectives are attained, project participants will start overcoming their educational deprivation and at some point will perform at the educational level appropriate for their age. Some states in our survey, however, do not require their LEAs to set levels of performance which, if attained, will enable project participants to start overcoming their educational deprivation. The instructions accompanying the LEA application in one state give an example of a "regressive" performance objective, the accomplishment of which would leave the project participants just as far behind their colleagues in the regular program as when the project began; it calls for "one month's gain per one month's instruction." The policy in a second state, however, is to require "progressive" performance objectives calling for greater than one month's progress for each month of instruction. The other states in our survey have no express policy on this matter despite its central importance to the purpose of Title I.

We recommend that the Title I regulations be amended to expressly require Title I performance objectives calling for a level of educational attainment high enough to enable project participants to start overcoming their educational deprivation. This interpretation is required by the statute. The ultimate need of educationally deprived children is to overcome their educational deprivation. Under the statute, Title I projects must offer reasonable promise of substantial progress toward meeting that need.

The requirement that Title I performance objectives establish progressive performance levels does not "pass judgment" on the educational success of a particular project. There is no legal penalty imposed on an LEA if program participants fall short of reaching the program's objectives. But the law requires that LEAs make the attempt to start accomplishing the statutory goal of Title I. Title I objectives must not be set so low that their accomplishment can nonetheless fail to result in progress toward that goal, since such objectives would not reflect an attempt to start accomplishing the purpose of the law.

A project that falls short of its objectives might nevertheless be judged by some to be an educational success. As the GAO Report noted, at 11, educators hold differing views on this subject. This debate is beyond the scope of our concern as it has no relevance to the legal requirements program designers must respect in establishing performance objectives for Title I projects.[148]

IV. Program "Scope"

§141(a)(1) of the statute requires LEA programs to have

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[148] Unless, of course, one offers the extreme argument that progressive performance objectives are so inherently unrealistic that there is no sense in trying to accomplish them. State policies and the actual results of numerous Title I projects are living rebuttals to such an assertion.

"sufficient . . . scope . . . to give reasonable promise of substantial progress." No federal documents offer comprehensive interpretations of this clause, but Program Guides #44 and 48 establish two important principles, the roots of which are in the provision. First, LEAs must offer project participants a balanced variety of services so that all factors contributing to the learning problems of educationally deprived children are addressed. Second, the Title I program must be coordinated with the regular school program so that the regular and Title I services together form an efficiently organized, comprehensive program for each participating child.

Program Guide #44 states:

> The Title I program, if it is to be truly supplementary, must be designed to extend and reinforce the regular school program. Insofar as possible, the regular school program, the Title I program, and any other special programs should be designed as a total program to meet the needs of children to be served.

Program Guide #48 also requires balanced, coordinated programs:

> The evaluation reports we have examined indicate that Title I programs, if they are to be effective, must be designed to meet the multiple needs of individual children . . . . Any Title I program . . . should be carefully coordinated with the program to be provided with local and state funds.

A balanced variety of services is needed because many different factors may be contributing to learning problems. Leaving any one of these factors unaddressed could totally frustrate what would otherwise be sound instructional services. A child who needs glasses or a child who is not motivated will not satisfactorily benefit from instructional services that are otherwise excellent. Thus, to the extent that the needs assessment identifies health, clothing, nutritional, or similar needs to be significant factors contributing to learning problems, Title I programs must consider such needs high priorities; the same point applies equally to needs in the affective domain -- in such areas as behavior, attitude, and motivation. A third implication of this same point is the need for instructional subobjectives which, as a group, span the full scope of each general instructional objective; specific constituent instructional needs should no more be overlooked than needs stemming from other contributing factors. This point is a basic principle discussed in the chapter on program development.

The need for a balanced variety of services does not mean that objectives in a multitude of different general instructional areas must be pursued. Of course, to the extent that a significant connection exists between mastery of one subject and success in another, sound planning would include both (or neither) in a comprehensive program. But Program Guides # 44 and 48 do not demand diversity for the sake of diversity; the balanced variety required is only that which is needed to address underlying contributing factors and constituent instructional needs and thereby facilitate successful pursuit of the general instructional objectives selected as the focus of the program.

The second major "scope" principle mentioned above -- coordination of Title I services with those of the regular program -- is discussed further by both Program Guides # 44 and 48.

§4.1 of Program Guide # 44 requires SEAs to ensure that:

> Consideration has been given to the relationship of the Title I program to the regular school program and to the possibility of modifying that program so as to provide a better base for the addition of supplementary compensatory educational services.

Expanding this point, Program Guide #48 states:

> The entire school program in the project area should be planned as a special program for the disadvantaged children involved. State and local funds would then be used to pay for that portion of the program which would replace the pre-existing regular school program and Title I funds would be used to pay for additional services above that level.

These principles require coordination of Title I and regular school programs so that the services of each are complementary. The program guide provisions quoted above also make two important points. First, an LEA has three basic options for ensuring that Title I services complement those of the regular program: 1) an LEA may continue its original regular program and add Title I services aimed at the needs not addressed (or not adequately addressed) in that program; 2) an LEA may modify its original regular program to provide a better base before adding Title I services which complement the new regular program; 3) an LEA may design a totally new, comprehensive program for the targeted children and assign the costs proportionately to the regular budget and the Title I budget.

Second, the coordination requirement of Program Guides #44 and 48 operates in conjunction with the supplanting prohibition to ensure that programs are properly designed.

The supplanting prohibition requires careful analysis of regular school programs to ensure that Title I services do not simply replace a portion of the regular program with an identical federally-funded activity. The coordination requirement in Program Guides #44 and 48 is designed to prevent gaps between the Title I services a child receives and the services offered in the child's regular program. Together, the coordination requirement and the supplanting prohibition ensure that Title I services complement regular school services to provide a comprehensive and efficiently designed program.

The requirement that Title I services and regular school programs complement each other does not impose any restriction concerning the instructional settings or strategies which LEAs may employ. Neither "pull-out" programs, nor "in-class" programs are required. In the sense that Title I programs must complement regular programs, a pull-out format is just as amenable to this purpose as an in-class format. Furthermore, both pull-out and in-class programs can be designed to fully comply with the supplanting restriction. These points are discussed in detail in the chapter on supplanting.

These principles are misunderstood by many states. Two states in our survey, for example, have reached opposing conclusions on the issue of pull-out programs. In one state, officials have vigorously asserted that the Title I legal framework requires pull-out programs which detrimentally isolate project participants. In another state in our survey SEA officials have asserted just as vigorously that the Title I legal framework makes it "most difficult" to design a legally permissible full-time pull-out program. Other states have a variety of policies, none of which is required by the Title I legal framework.

One state, which allows only pull-out programs, has formulated specific requirements for quarter-day, half-day and full-day pull-out programs (these requirements concern pupil/teacher ratios and the number of subject areas in which the participants must be educationally deprived). A second state has a policy which prohibits students from receiving services from a specially funded program, including Title I, for more than an average of two hours per day. In a third state, the SEA indicated it would not allow a full-day pull-out program and would seriously question a half-day pull-out program. This state's application form suggests an average range of 20 - 30 minutes a day, 3 - 5 days per week for a Title I program.

Another principle frequently misunderstood concerns the proper basis for a decision to offer or not offer support services or activities designed to accomplish objectives in the affective domain. (Recall, two principles govern this decision: 1) needs in these areas must be found to be causes of learning problems, and 2) needs so found should be prioritized according to the importance of their relationship to an academic need and the relative importance of that academic need.) Some states in our study have policies which, in one way or another systematically discourage or de-emphasize objectives in the affective domain or support services such as food or clothing. One state's officials reported that they were trying to "get out of the business" of providing support services. The SEA in a second state reported that attitudinal or motivational changes are merely hoped-for "by-products" of an instructional program. Support services are almost never allowed in this state since they are automatically, and without regard to the needs assessment, deemed to be low priority. A third state has a similar policy.

It is understandable how officials having insufficient time or inclination to study federal documents might reach erroneous conclusions concerning the meaning of the passages quoted from Program Guides # 44 and 48. These documents do not explain that serving "multiple needs" does not mean providing superficial, diffuse services in many different general instructional areas. They do not explain that closely coordinated activities are not necessarily activities in the same classroom. Program Guide # 48's reference to a "program which would replace the pre-existing regular school program" requires careful analysis to understand how a supplanting violation is not involved. Many states that were criticized in the past for providing too many scattered, unrelated support services over-reacted by virtually banning them (and were never directly advised otherwise). Furthermore, in a letter to one SEA (not in our survey) OE referred to the potential "negative effects" of full-day pull-out programs without mentioning that equally harmful stigmatization is possible in in-class programs:

> Any negative effects of temporary isolation of children in the pull-out classes must be out-weighed by the positive effects that have been shown as the result of participation in the program.

New regulations should eliminate such misunderstandings. They should untangle and clearly reaffirm the basic principles that require LEAs to offer a balanced variety of Title I activities and services which are coordinated with those of regular school programs. New regulations should expressly state that neither these principles nor the supplanting prohibition require any particular instructional setting, format, or strategy. OE should affirmatively counteract misperceptions on the part of SEAs by preparing program models reflecting a range of alternative designs (from 100% pull-out to 100% in-class). Furthermore, these models should be accompanied by simply-worded legal interpretations which identify the principles which explain why each model is a legally permissible design. New regulations should identify the potential harmful effects of stigmatization, isolation, or other similar problems, the circumstances in which they arise, and safeguards to minimize or counteract the harmful effects. New regulations should expressly require that the identified harmful effects of any particular design must be both inherent in that design and clearly outweighed by positive features unique to that type of program.

We can only state these principles generally due to the limits of our expertise; we anticipate, however, that all of the issues concerning collateral harmful effects will require careful research and consideration by OE.

V. Program "Quality"

The quality of Title I programs is an express statutory concern. Under §141(a)(1)(B) of the Act, Title I projects must be "of sufficient . . . quality to give reasonable promise of substantial progress."

Directly implementing this statutory requirement, §116.17(c) of the regulations requires, "each local educational agency shall design its projects in such a manner . . . as will best meet the special educational needs of the educationally deprived children." (Emphasis added.)

The regulatory requirement that Title I projects have the "best" design is implemented by another regulatory provision, §116.18(b), which requires that Title I projects be "well planned":

> Each . . . application . . . must demonstrate that the project has been sufficiently well planned to meet . . .[its]. . . objectives and that the project makes adequate provision for its implementation in an effective manner.

The regulatory requirements that projects have the "best design" and be "well planned" -- both of which directly implement the statutory concern for program "quality" -- are important and necessary federal legal standards. They are phrased in general terms, however, and have never been given specific content. The reason for this has been reluctance on the part of OE to set specific standards with respect to a judgmental program characteristic such as quality. Thus, the states have been given significant responsibility for initiating policies to enforce the program quality requirement of the statute. While in the majority of other Title I areas a state's responsibility is primarily to ensure LEA compliance with more specific federal requirements, here states must take the lead in setting standards.

No state in our survey, however, has made more than scattered efforts in this regard. Furthermore, the existence of a few, isolated, but sometimes quite specific, quality standards in each state indicates that the general scarcity of quality standards is not due to deliberate, consistently implemented policies which leave all quality questions to the discretion of LEAs. SEAs, in our judgment, have simply paid insufficient attention to these issues. Neglect, not carefully crafted restraint, is what we have found.

The neglect of federal statutory requirements is a serious matter. Moreover, toleration of this neglect is not necessary to preserve state and local discretion. There is a middle ground between uniform federal specification of quality standards and allowing states to ignore the statutory program quality requirement.

We recommend that new regulations expressly identify the program quality issues which SEAs must address and require SEAs to prepare program design handbooks which either (1) set procedural and substantive standards facilitating the design of high quality programs, or (2) at a minimum, comprehensively identify the factors which LEAs must consider in formulating their own policies on a given issue.

Procedural standards might be best for addressing such issues as the persons involved in program planning, utilization or research and evaluation information, and the order in which program design decisions must be made. Substantive standards might be best for addressing such issues as staff qualifications, organization and training, the adaptability of services to meet individual needs, and the specificity with which activities are planned. If an SEA is convinced that a given issue is one which can only be resolved after more evidence is gathered, the SEA might clearly outline the issue, identify the relevant factors, analyze the uncertainty involved, and allow LEAs to establish their own policies.

The sample issues just mentioned are major quality issues relevant to program design which we were able to identify in federal documents and state policies. There are undoubtedly others. This is not an area in which we have expertise; hence, we recommend that OE prepare a more comprehensive analysis of quality issues prior to specifying in new regulations those which SEAs must consider.

In requiring SEAs to prepare handbooks

in these areas, new regulations should indicate that SEAs may grant LEAs a number of options for meeting a given standard and may allow LEAs to create new options so long as the SEA identifies the factors which LEAs must consider and ensures that LEAs explain their policies in terms of these factors. The purpose of the handbook requirement is to implement a necessarily judgmental statutory standard by requiring active attention to the relevant issues. Its purpose is not to confine educational practices.

A. Staff Qualifications

An SEA policy in one state in our survey begins with the observation, "a Title I instructional program has little chance for success unless each instructional program is staffed with well qualified teachers." Federal documents and SEA policies identify several factors relevant to staff qualifications. The OE handbook entitled Title I ESEA: Conducting On-Site Visits, at 24, states that the interest and enthusiasm of the Title I staff are important considerations. Title I ESEA: How It Works, at 4, asserts:

> Most teachers hired under Title I have specific skills which the regular classroom teacher may not have or may not have the time to use. Many school districts hire remedial reading or math teachers as part of their Title I program.

> Others employ language arts specialists to offer reading readiness to preschool children . . . . if these teachers work only with children eligible for Title I services and their job is not the same as that of a regular school employee in a non-Title I school, their salaries may be paid for under Title I.

Title I ESEA: How It Works also makes several points concerning the qualifications of Title I aides:

> Parents should be sure the aides employed in a Title I program represent the community, and parents themselves, if they apply, must be considered for employment. Much of the success aides have experienced is due to their knowledge of the childrens' life out of school; they understand the childrens' background and children sometimes find it easier to identify with and talk to an aide rather than the teacher.

An OE guideline that is no longer effective, OE-35079, indicated, at 33, that ability to "bridge the gap in communication that frequently exists between the home and school" is an important qualification for Title I staff members.

SEA policies in several states in our survey echo these thoughts. Two encourage LEAs to give parents of project participants priority consideration for employment as teacher aides. In one of these states, LEAs employing Title I teachers should give priority to applicants having training and experience in working with educationally deprived children. In addition, Title I teachers "must be able to relate well to educationally deprived children."

In the employment of Title I teachers in another state, priority should be given to applicants having the following qualifications: (1) a "record of successful teaching experience; (2) the ability to "relate well to participating pupils"; and (3) "an understanding of the culture of poverty." Other relevant policies in this state include the following:

> Aides shall be recruited actively from among residents of the target area; recruiting efforts for aides shall be conducted first within the attendance areas of the school they are to serve. In all cases priority should be given to residents who are parents of participating children.

In this state, moreover, "it is imperative that the Title I staff members reflect the ethnic and racial diversity of the district population." Finally, this state's policies provide that "only tests which are validated to measure the qualifications required for Title I teacher aides shall be used."

Despite the recognized importance of high staff qualification standards most of the states in our survey have set none. We recommend that new regulations expressly require SEA program design handbooks to comprehensively address the issue of staff qualifications and either establish valid standards concerning, or identify factors relevant to, the quality of the Title I staff. With respect to employment of aides new Title I regulations should ask SEAs to consider policies which require active recruitment among parents of project participants and which indicate that qualification standards may not be a barrier to employment but may only be standards which aides must meet after they have been afforded an adequate opportunity to acquire on-the-job training.

B. Staff Organization

§5.1 of Program Guide #44 requires LEAs to ensure that their "proposed staffing pattern is appropriate for the activities and the services to be provided." The program guide continues, saying,

> use should be made of a variety of personnel other than professional classroom staff. Parents of participating children, volunteers, and persons in the community with special skills should be considered in the selection of the staff needed to provide the specified services.

Title I ESEA: How It Works, at 5, suggests the utilization of tutorial systems:

> Tutors, either adults or older students help children, particularly in reading and math. A tutor usually works with one or two children. He [SIC] sometimes accomplishes more simply because the child does not see his tutor as a "teacher". A side effect is that the tutors themselves often learn more.

One state in our survey has formulated policies describing two types of teacher aides and establishing specific limitations on the kinds of services each can provide. This state has also formulated specific standards concerning the extent to which Title I consultants may be employed. These standards concern both the maximum and minimum number of teachers a consultant may assist and the specific services consultants must provide.

Policies in a second state in our survey indicate that Title I personnel should "function as team members" and not be isolated in their specialties. This state's policies also indicate that Title I aides may be used either to provide extra instructional services to Title I eligible children or generally assist a teacher so that the teacher may have more time to give project participants extra attention. This state's policies also require LEAs to consider establishing "career ladders" for teacher aides.

Other states in our survey have not formulated standards designed to ensure effective organization and utilization of Title I staff members. In light of the importance of sound personnel organization and the need to coordinate many different kinds of services in a comprehensive program, we recommend that new Title I regulations expressly require SEAs to formulate standards to ensure that sound Title I staffing strategies are employed. New regulations should ask SEAs to consider standards which require Title I staff to be organized according to the actual capabilities of the available personnel rather than any unnecessary or arbitrary requirements of pre-determined job positions. SEAs should also consider standards ensuring that the organization of the Title I staff is conducive to high morale by offering interesting and rewarding employment to all involved. Another SEA standard might require LEAs to prepare job descriptions for each member of the Title I staff based on individual capabilities.

C. Staff Training

The current Title I legal framework expressly recognizes the importance of inservice staff training to ensuring high quality Title I programs. §141(a)(12) of the statute makes "coordinated programs of training" mandatory components of Title I projects which involve the use of "education aides." In addition, the statute requires that the "professional staff" whom the aides are assisting "participate together" with the aides in the training programs. Prior to 1974, the regulations had always recognized inservice training as a legitimate Title I expenditure; §116.23(a) of the regulations, dating from 1966, identifies "in-service education" as a principal means by which LEAs may meet their information dissemination obligations.

§5.2 of Program Guide #44 stresses the importance of staff training:

> The orientation, indoctrination, and development of the personnel who have been selected to conduct the Title I program is probably the most critical phase of the Title I program.

Several federal documents offer interpretations of the statutory requirement that staff training programs be "well developed." Taken as a whole, these documents indicate that staff training should be a mini-project within the Title I project and should be planned in much the same way as Title I projects. This means that staff training should be based on an assessment of training needs. These needs should be directly related to the Title I services the staff must provide. Staff training programs, moreover, should be designed to accomplish performance objectives, should be concentrated to have an adequate impact and should be evaluated in terms of their impact on the achievement of Title I project participants served by the staff.

§5.2 of Program Guide #44 states:

> Inservice training will be geared specifically to the requirements of the Title I program and the needs of the Title I staff.

Amplifying this point, OE's handbook entitled Conducting On-Site Visits, at 17, indicates that there should be "documentation of need for the particular inservice training which is offered."

Title I ESEA: How It Works, at 38, states that performance objectives "must be written" for teacher training programs although "the objectives for the teacher training . . . will be more difficult to set because there are no standardized tests to judge the effectiveness of these activities."

Regarding the design of staff training programs, Program Guide #44 adds:

> Furthermore, the inservice training program should be of sufficient size and depth to have an impact on the participant in the Title I program . . . . Each Title I application involving the use of education aides should set forth (a) definite proposals for . . . training . . . or (b) a detailed description of such a program in which most of the aides and professional staff members they will assist have already participated.

OE's On-Site Visit Handbook, at 17, states that there should be "an evaluation of inservice training activities in terms of impact on the Title I project." The handbook also asks SEAs to ensure that inservice training activities are "adequate with respect to content and with respect to scheduling."

In addition to applying the concepts of needs assessment, performance objectives and evaluation to Title I staff training, several federal documents indicate the subject areas in which training needs should be assessed. §5.3 of Program Guide #44 states:

> Special attention should be given to the development of the most effective ways the professional staff members and their aides can work together and of ways in which a long-term training program may assist both professional staff members and aides to take on increasing responsibilities.

OE's On-Site Visit Handbook, at 16, stresses the need to ensure that an established process providing a regular flow of information exists for the coordination of support services and instructional services. Thus, this is another topic for inservice training. The recent GAO Report, at 29, identified several areas in which inservice training of Title I staff is needed:

> (1) The intent and requirements of the Title I program, (2) effective use of teacher aides, (3) remedial reading, and (4) special education techniques and approaches.

A question left unclarified by the legal framework, however, concerns the circumstances in which regular classroom teachers may participate in Title I funded inservice training. Program Guide No. 24, which was cancelled by OE on September 26, 1972, provided that only

> individuals who have specific assignments in a Title I project may participate in an inservice training program funded under Title I . . . . Other staff members . . . who will be working with Title I children outside the Title I program may participate in inservice training on a space available basis.

Program Guide #44 does not mention the inclusion of regular classroom teachers, even on a space available basis; with respect to inservice training, its focus is entirely on persons "selected to conduct the Title I program." The legislative history of the 1974 education amendments, however, contemplate the provision of Title I funded training to regular classroom teachers, but do not specify when it is permissible:

> The committee can even conceive of situations in which some supplementary training for the disadvantaged child's regular classroom teacher is also important in the child's educational development.149/

And:

> It is anticipated that the type of teacher training which will be funded will include both training of specialists to deal solely with the educationally deprived and also the training of teachers who are in the regular classrooms but who number the educationally deprived among their students.150/

Nearly all the states in our survey have policies expressly recognizing the critical importance of staff training to the implementation of high quality Title I programs. A minority of states require inservice training for all Title I projects, not just those utilizing aides.

149/ Sen. Rept. No. 93-763, *supra*, at 31.

150/ H.R. Rept. No. 93-805, *supra*, 3 *U.S. Code Cong. and Adm. News*, at 4108.

Though there is wide-spread recognition of the importance of staff training, none of the states in our survey has a policy incorporating all of the minimum standards contained in the federal documents quoted above. No state policy manifests an attempt by the SEA to initiate staff training policies designed to exceed minimum standards of quality and ensure high quality training programs.

The officially promulgated regulations in one state included in our survey provide:

> Inservice training must be geared specifically to the needs of the Title I program. This would primarily involve Title I funded staff but may in some instances involve training of other district personnel who are directly involved in the accomplishment of the program's objectives.

Guidelines in a second state include the following "limitations

> Title I funds will be expended to provide inservice training only for teachers and other personnel having definite assignments to be carried out in the operation of Title I projects and only for such training as may be appropriate in connection with their assignments.

The guidelines add, however, that "those employed with non-federal funds who perform services which are an integral part of a Title I instructional activity" may also participate in Title I funded inservice training. But the guidelines then explain that the "burden of proof" is on the LEA to show that such persons

> are rendering services to educationally deprived children which are clearly in addition to the regular school program. This will be done through some type of special arrangement or scheduling. [Emphasis added.]

Thus, "regular" classroom teachers providing "regular" services to children participating (at other times) in Title I programs, would seem to be excluded. Finally, this state's guidelines require that an LEA designing inservice programs which include teachers not paid by Title I must obtain prior written approval from the SEA.

Requests for approval must contain the following information:

> 1. A description of the proposed inservice training program . . .
>
> 2. Names of each participant whose salary is paid by non-Federal sources.
>
> 3. The present Title I assignment of each participant whose salary is paid by non-Federal funds.

On this issue the SEA in another state explained that "inservice for non-Title I staff is a questionable expenditure unless it can be demonstrated that it relates specifically to working with target students in the area identified as needs."

In another state, staff development is one of six required components of any Title I program which can be waived by the SEA upon request accompanied by a written justification. The state's officially promulgated regulations covering Title I and other state compensatory and reform legislation provides for the inclusion of a broader range of persons in the training process.

> School Districts . . . shall provide staff development for all certified and classified personnel involved in the program to insure successful implementation of the program. Staff development activities must be related to the unmet needs for staff as identified in the needs assessment.

The SEA guidelines further explain that "all personnel -- i.e., certified and paraprofessional -- who have contact with project children in any way or who work on the project must participate in the inservice education activities."

With respect to the "Types of Training," the SEA guidelines generally provide that "the types of inservice training approvable under Title I are limited by the objectives of the local educational agencies project."

In one state, the 1977 Title I application form explains the major goals of inservice training. First, "it should include training to achieve an understanding of ESEA Title I by all staff and to develop the instructional skills of the Title I staff. Second, inservice training should provide instructional skills and techniques directly related to the project activity and Title I children."

With respect to the content areas, the guidelines provide that the following must be included in the inservice training:

> "1. Specific instructional skills related to the objectives of the project,
>
> 2. The dimensions of poverty and its effect on children,

3. Attitudes of teachers and their relationship to the learning process,

4. Intergroup and intercultural understanding,

5. The development of effective ways of incorporating curricular innovations which are necessary for curriculum that is relevant to the needs of the project participants."

Staff training is one program quality variable that should be addressed in federal as well as state standards. We recommend that the standards included in existing federal documents be expressly incorporated in new Title I regulations Thus, new regulations should require that staff training projects be based on an assessment of training needs, that staff training programs be designed to accomplish performance objectives, that staff training projects be evaluated in terms of their impact on the achievement of project participants and that staff training projects concern one or more of the following areas as the training needs assessment may indicate: the subject area to be taught by the Title I staff, innovative techniques, teacher attitudes and morale, the factors which contribute to educational deprivation, socio-economic characteristics of the project area community, techniques for promoting home/school continuity, coordination of efforts among Title I staff and the teachers in the regular program, the legal requirements of Title I, the specific design of each Title I project and the role each member of the porject staff is intended to play.

New Title I regulations should address the question of the circumstances under which regular classroom teachers who provide services to Title I program participants may receive Title I funded inservice training. We recommend that no special restrictions be imposed on the participation of such teachers in Title I funded training. Rather, the same principles recommended above for application to all Title I inservice training programs should be applied, as well, to training of regular classroom teachers who serve Title I program participants.[151]

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[151] Of course, the use of Title I funds for training of regular classroom teachers, as with the use of Title I funds for any purpose, must comply with the supplanting, general aid, and ordinarily provided provisions. (See generally the individual chapters on those requirements.) Thus, Title I funds cannot simply replace state and local funds that would have been made available for inservice training purposes, and Title I areas must receive their fair share of the state and local funds that are actually provided for inservice training. To avoid general aid violations LEAs must, when they use Title I funds to train regular classroom teachers, ensure that only regular classroom teachers who actually serve Title I program participants receive the training. Furthermore, the training received by regular classroom teachers must be designed to enhance their ability to successfully serve Title I participants. This does not mean that the teachers must "forget" or "not apply" what they have learned in Title I training programs when they serve non-Title I children, it simply means that the original design of the training program must be based on the needs of Title I program participants. The general aid prohibition, in this way, underscores the necessity of basing the design of training programs on a training needs assessment.

Furthermore, we recommend that the Title I legal framework be amended to make inservice staff training a mandatory component of all Title I projects unless a waiver is granted by the SEA. A waiver should be granted only if an LEA's training needs assessment indicates no training needs in any of the topic areas listed above and if an evaluation of the LEA's most recent Title I program indicates that the performance objectives established for each project were met.

SEA program design handbooks should expressly incorporate these federal standards and should supplement them with policies which will ensure high quality inservice training programs.

D. Individual Plans and the Adaptability of Services to Meet Individual Needs

§141(b) of the statute requires OE to encourage LEAs to develop individualized written plans for each project participant:

> It is the intent of the Congress to encourage, where feasible, the development for each educationally deprived child participating in a program under this title of an individualized written educational plan (maintained and periodically evaluated), agreed upon jointly by the local educational agency, a parent or guardian of the child, and when appropriate, the child.

Prior to the adoption of this statutory provision, Program Guide #44 stressed a concept of individualized services distinct from the idea of formal individualized plans. §5.1 states:

> The ratio of project staff to the number of children to be served should be high enough to provide concentrated, individualized services.

This concept of individualized services was also implicit in pre-existing OE needs assessment and program design policies. Title I ESEA: How it Works, at 17, states that once the educationally deprived children are identified "it is necessary to consider the child as an individual not as part of a group." The GAO Report, at 19, also indicates OE's policy concerning individualized needs assessment:

> OE considers it advisable to develop student profiles which identify the needs of individual students. These profiles are then to be summarized so that the cognitive affective health and welfare needs of groups of students become apparent and so that components of a comprehensive program can be identified.

An OE technical assistance packet entitled "Common Characteristics of Successful Compensatory Education Programs" identifies "attention to individual needs" as one of eight characteristics of successful programs. Another OE technical assistance packet entitled "Title I -- Compensatory Education" states that "compensatory education must . . . be applied to individual needs." The principles discussed in Program Guide # 44, Title I ESEA: How It Works, and OE technical assistance packets are distinct from the statutory concept of "individual plans." These principles concern the flexible adaptation of basically group oriented instructional activities to better suit the needs of individuals. These principles antedate the statutory requirement of individual plans. The adaptability of services to individual needs is a requirement of Program Guide #44. Formal individual plans are not required but are merely encouraged.

A strong minority of the states in our survey have policies which expressly stress the importance of individualized instruction. SEA policy in one state indicates:

> In all successful projects, in and out of [this state] . . . the one common factor identified was people working with people on a one-to-one or small group (no more than four-to-one) basis .

In another state, the SEA mandates individualized instruction as follows:

> Each school maintaining programs under this chapter shall restructure its educational program to assure that each participating student will have an individualized program designed to promote the development of his/her maximum potential. The instructional program shall be based on continual assessment of students' needs and prescriptions chosen from a variety of curriculum possibilities.

This state's guidelines also offer the following:

> The focus of all instructional compensatory educational activities shall be the provision of an individualized instructional program. Individualized instruction is defined as the assignment of appropriate learning tasks to each child as determined by a comprehensive diagnostic assessment of his strengths and special educational needs.

We recommend that new Title I regulations incorporate the requirements of Program Guide # 44 with respect to individualization of instructional services provided to groups of project participants. New regulations should carefully distinguish between the concept of individualized plans (which are not required) and the adaptation of group oriented services to meet individual needs (a capability which all Title I projects should have). SEA program design handbooks should reflect these principles and offer supplemental standards concerning the organization and implementation of individualized instructions.

E. Utilization of Research Information In Program Design

§141(a)(10) of the Title I statute requires LEAs to adopt "effective procedures" for two major purposes. First, effective procedures must be established "for acquiring and disseminating to teachers and administrators significant information derived from educational research, demonstration, and similar projects." Second, effective procedures must be established "for adopting, where appropriate, promising educational practices developed through such projects."

The regulations implementing the statutory provisions fail to mention the second purpose of the "effective procedures" which LEAs must establish. §116.25(a) states that

> Title I applications must describe methods to be used . . . for reviewing . . . significant information on the latest developments and most recent experiments in education so that such information will be available for use in program planning.

The regulation does not mention the statutory requirement that "promising educational practices" be actually adopted "where appropriate."

Program Guide # 44 and documents which are part of the federal informal legal framework stress the importance of utilizing research information in the design of Title I programs but, in the absence of regulatory language implementing the full scope of the statutory provisions, state policies have not been adequate to ensure compliance with the statutory requirements.

§5.8 of Program Guide # 44 states:

> In addition to the dissemination that takes place through inservice training programs for the Title I staff, relevant information concerning compensatory education from such sources as research and demonstration reports should be made available through appropriate forms of communication to Title I and other school personnel servicing participating children. Emphasis should be placed on the dissemination of information which will contribute to improved program planning and operation both in the applicant's district and in other districts. Conversely, applicants should be able to demonstrate that their Title I staff members, in planning program activities, have considered the information that has been made available to them.

An OE technical assistance packet entitled Title I Dissemination states:

> The regulations refer to the need for the LEA to disseminate to the planning committee, including the council, the latest developments and most recent experiments for review and consideration while designing the Title I program . . . . A great variety of materials is available from local, state and federal sources for the LEA to disseminate to those responsible for planning the Title I project. The Office of Education has established an educational reference service to provide free materials.

OE's handbook Conducting On-Site Visits, at 21, asks SEAs to ensure "that program changes have occurred within . . . LEAs because of the dissemination of good practices."

OE-35079, at page 29, suggests that SEAs "take leadership in the area of disseminating the information on educational research, demonstration and similar projects" by establishing:

- A state clearing house of outstanding ideas for Title I projects.
- A system to disseminate, after a period of time, information on the most promising and innovative Title I projects approved by the state.
- A system to distribute and otherwise make available books, brochures, booklets, reports, documents, films, tapes and other articles which would help the local educational agencies plan and evaluate their systems.
- A system to make use of the educational research information center at the U.S. Office of Education, and possibly a similar or complementary center at the state capitol or state university.

- A roster of state educational agency, university, and other personnel who could serve as consultants to local educational agencies to help them with the design and evaluation of their projects.

- A system for gathering and disseminating the research and demonstration activities of universities and school systems which have had a good deal of experience in meeting the special educational needs of the educationally deprived.

Despite the emphasis placed by federal documents on the importance of disseminating and using research information, the GAO Report found at 32-33:

> None of the LEAs and only three of the SEAs had formal systems for disseminating information on exemplary projects.. . . At nine SEAs and fourteen LEAs, officials indicated they had received insufficient information and training from OE or the SEA concerning dissemination. One LEA Title I Director said the lack of information on exemplary projects was one of the Title I programs' real weaknesses . . . . One SEA official said methodologies must be developed to provide LEAs, not only with general information about exemplary projects, but also with opportunities to see, participate in, and understand the procedures used in developing and implementing such projects. One LEA had received lists of projects which other LEAs had defined as exemplary. These lists did not elaborate on the procedures, techniques or evaluations of the projects, but only stated that other state and LEA personnel could visit the projects to observe and evaluate them.

Generally speaking, the states in our survey were not found to have adequate policies to ensure the systematic dissemination and utilization of research information in the program design process. Only half the states surveyed have written policies concerning information dissemination. One state has established a clearinghouse for outstanding project ideas and a dissemination system for books and other materials. Other states, however, have not. A state in our survey not covered by the GAO Report indicated that the major problem LEAs have been having in planning Title I programs is that they "have not been exposed to new ideas and if they are exposed, they don't have time and resources to 'pull-off' new concepts." The most common inadequacy of state policies in this area is the same inadequacy that is found in the federal regulations -- the failure to require that research information be used in the program design process. In addition, most of the states in our survey do not have policies ensuring that research information will be systematically disseminated to program planners.

This is an area in which the Title I regulations must be changed so that they fully implement the requirements of §151(a)(1) of the statute. The current Title I regulations require that research information be reviewed, but the language of the regulations must be changed to require LEAs to actually decide whether the particular research findings they review are "appropriate" for implementation. If they are judged to be appropriate, they must be implemented; the regulations should so indicate. SEA program design handbooks should include specific procedural standards to ensure effective utilization of research information. Furthermore, as evidence gathered from educational research establishes the validity or effectiveness of particular practices or policies, SEA program design handbooks should include quality standards reflecting those results. Title I regulations should identify both of these SEA tasks, emphasizing that these are areas where states, not OE, should assume a leading role.

F. Utilization of Evaluations of Past Title I Projects in the Program Design Process

Since the results of evaluations of an LEA's past Title I projects is directly relevant to the design of new Title I programs, the requirement that evaluations be used in the program design process is implicit in the requirement that relevant research information be considered by program planners. Evaluations of an LEA's own programs are, in fact, just a special kind of research information.

§4.3 of Program Guide # 44 states that with respect to each major activity proposed for a Title I program

> reference should be made to evaluations of similar activities carried on during preceding years, the program changes that have been made as a result of such evaluations, and the types of improved performance expected by the end of the new program year

Amplifying this point, OE's handbook, Conducting On-Site Visits, at 22, asks SEAs to ensure that LEAs offer "evidence that evaluation results are being fed into program development."

Though most of the states in our survey recognize the desirability of utilizing past evaluations for program design purposes, the states have generally not formulated policies which ensure that the statutory and regulatory requirements concerning use of evaluations are met. Only one state in our survey indicated that annual evaluation reports are prepared in time to be utilized in planning the next year's project. One other state "encourages" LEAs to complete their evaluations prior to designing next year's program, but all the other states in our survey indicate that LEA evaluation reports are not completed in time to be used for planning next year's program. One state in our survey indicated that most LEAs don't use evaluations for program design purposes even if they are available.

We recommend that new Title I regulations expressly require LEAs to utilize in the design of future programs evaluations of previous projects that are available. Though this requirement is implicit in the current statutory provision concerning utilization of research information, the failure of the states to formulate policies adequate to implement this requirement indicates that OE must provide more guidance on this point in new regulations.

We recommend that new regulations encourage SEAs to set deadlines for the completion of annual LEA evaluation reports so that those reports will be available for designing the following year's Title I program. New regulations should require that if an annual evaluation is not prepared in time, an LEA must consider changes in its Title I program that reflect the results of the evaluation report when it is completed and must then seek approval for these changes from the SEA. New regulations should also expressly require that, to the extent that evaluations reveal reasons why past programs have not been completely successful, those reasons must be reflected in the design of new Title I programs so that past mistakes are not simply repeated.

One of the specific findings of several evaluations of Title I projects is that gains made during the regular school year tend to be lost over the summer. §4.4 of Program Guide # 44 requires that LEAs give "due consideration" to the operation of summer programs:

> Applicants should examine closely the possibility for meeting urgent needs through summer programs. The summer period provides opportunities for new activities which, while designed to overcome educational deficiency, can be more specifically and extensively adapted to the needs of the children to be served. Special efforts should be made, however, to be sure that the children who participate, receive assistance designed to

> continue the gains they have made in the preceding school year or to prepare them for the next school year's activities under the regular school or the Title I program.

Most of the states in our survey recognize the utility of summer programs but one state rejects summer programs on the ground that they are too short in duration to have an adequate impact.

We recommend that new Title I regulations indicate that LEAs experiencing the "summer loss" phenomenon must develop a specific strategy to counteract this problem, just as they must attempt to solve any other specific problem discovered through their evaluations. New regulations should incorporate the provision of Program Guide #44 which requires the consideration of summer programs. As Program Guide #44 indicates, summer programs that are provided should relate directly to either the activities of the preceding year or the upcoming year or both. Continuity with past or upcoming activities eliminates the "short duration" problem.

G. Standards Establishing Planning Procedures

Several federal documents included in the informal Title I legal framework stress the importance of standards establishing sound planning procedures. These standards concern such matters as the timing and ordering of program design steps.

OE's technical assistance materials entitled Common Characteristics of Successful Compensatory Education Programs emphasizes the importance of systematic planning procedures and an orderly program design decision-making process. A specific problem in this regard is discussed by two OE handbooks (Title I Resource Identification and the Handbook on Performance Objectives). This is the problem of LEA program design processes focusing too heavily and too early on resource constraints rather than the needs that an optimal program should meet. OE's resource identification materials state:

> It is recognized that possible resources be considered all during the planning phase. However, one must be wary of designing only those programs for which resources are known to exist from past experience. Unfortunately some Title I program designs have been limited by previously identified resources or by not investigating possible resources other than Title I. Ideally, programs should be designed which would most effectively reach objectives and then the resources should be found for implementation. Although this is not always completely possible, every effort should be made to find the resources to implement the best program.

OE's Handbook on Performance Objectives, at 8, concurs clearly, indicating that objectives and activities should be established prior to resource identification:

> Program Design -- Performance objectives and goals provide the base for the program design. During this step, program components are identified by the Title I staff and accounted for as action steps under performance objectives. Procedures, activities, and techniques required to carry out the project objectives and attain the project's goals are specified. Personnel equipment, supples, and space must also be determined at this point.
>
> Resource Determination -- Once the program design step has been completed, the project development staff must identify all possible resources which can be used in forming the solution to meeting the needs.

Several states in our survey reported that their LEAs are having major problems establishing sound systematic program design planning procedures. In two states, the lack of adequate planning time is a serious concern. In one of these states, the SEA said the problem is compounded by union contracts which limit planning time. The SEA in this state establishes no procedural standards to guide LEA program planning. The SEA reported, however, that its new monitoring form was "well received" by LEAs because it provided LEAs with significant guidance concerning sound program planning procedures.

The on-site evaluation form in another state asks only "if formal meetings for planning purposes have been held." One SEA in our survey indicated that it is unable to enforce standards intended to promote sound planning procedures in the absence of an express mandate from OE.

We recommend that new Title I regulations expressly require SEA program design handbooks to establish procedural standards ensuring that LEAs set aside adequate time for program planning purposes, identifying step-by-step procedures for program planning which omit no critical steps or decisions, and requiring LEAs to establish their project objectives and activities prior to identification of available resources.

H. Program Planners

Aside from requiring active participation by parent advisory councils, the statute and regulations do not set standards concerning the persons who should participate in program planning. The need to involve Title I staff members in the design of the Title I program is stressed, however, by several federal documents which are part of the informal Title I legal framework. These documents identify a two-fold benefit stemming from staff involvement -- improved program quality due to the expertise the staff brings to program design decision-making, and improved likelihood of success due to the greater sense of commitment to the project which staff members will have if they are involved in its original design.

An OE technical assistance packet on Title I -- Performance Objectives stresses, at 2, the need to have the Title I staff "participate in the review of draft objectives to help determine their 'reasonableness.'" OE's On-Site Visit Handbook, at 22, urges SEAs to establish policies which ensure that Title I "teaching staff [are] involved in the development of the [project] evaluation design." An OE technical assistance packet entitled Common Characteristics of Successful Compensatory Education Programs stresses the need to allow "teachers, aides, and volunteers to play a cooperative role in formulating inservice training" plans. Summarizing all these specific recommendations for staff involvement, OE-35079, at 28, indicated that the rationale for information dissemination concerning needs assessment and project design is "so that teachers and other professional staff may better contribute to the design and implementation of local projects."

In one state in our survey, staff involvement in the design of Title I programs is an express policy:

> Instructional components should be designed by the professional staff at the school level to accomplish the schools' own objectives . . . . Program design is carried out by the principal and the professional staff.

Other states in our survey, however, have not formulated policies which ensure that professional involvement in program design is not simply limited to LEA administrators. We recommend that new Title I regulations expressly indicate that Title I staff members (from teacher aides to administrators) must be involved in the design of the projects they will implement.

A related issue concerns the extent to which Title I planning should be performed by district officials and school personnel. One state in our study requires that Title I performance objectives be established at both the district level and the school level. Two other states allow either district or school level performance objectives but encourage the formulation of performance objectives at the building level.

The current Title I legal framework contains no express standards concerning the level at which performance objectives should be formulated. The issue is important, however, and two factors strongly suggest that performance objectives should be set at the school level. First, conditions vary from school to school. Though a district level performance objective in a general instructional area would be appropriately applied to all schools (for uniform measurement purposes under §151 of the Act), the subobjectives pursued as the means for accomplishing the general instructional objectives might vary from one attendance area to another. One school, for example, might have a more serious problem in lack of student motivation than another school, indicating the need for greater emphasis on attitudinal subobjectives.

Second, involvement of the instructional staff in the planning of performance objectives is both necessary to ensuring that performance objectives are realistic and to promoting staff commitment to the objectives of the project they must implement. Maximum staff participation can best be accomplished by building level planning.

Neither of these two factors, however, requires the formulation of objectives or activities at the school level. We recommend that new Title I regulations require LEAs to receive input from Title I staff members at each targeted school and consider varying conditions from school to school, but regulations should leave to SEA program design manuals the task of specifying standards for implementing these requirements.

VI. Standards for Oversight Mechanisms

For LEAs to meet the regulatory requirement that Title I projects be "well planned", they must specifically identify the activities and services they will provide in meeting the project performance subobjectives and objectives. As the SEA policy in one of the states included in our survey states:

> Instructional activities do not (or should not) merely happen; they must be planned and reduced to a written form. They must be planned to facilitate the accomplishment of measurable objectives already developed.

The planning documents prepared by LEAs in designing their Title I programs should of course, be records that are retained and made available to SEA on-site monitoring teams. Some of the information in these documents, moreover, should be included in LEA project applications.

A. Application Approval

Most of the states in our survey recognize that activities and services must be carefully designed and specifically described, but the states have not clearly informed LEAs how these requirements can be met. One SEA, commenting on its own policies, describes what is typical of all the states in our survey:

> For the designing of instructional components, perhaps the most demanding part of the planning process, the Department of Education has the least specific instructions.

Most SEA application approval policies rely on general narrative descriptions as the primary means for overseeing LEA compliance with program design requirements. Sample policies include the following:

> Describe and clearly identify the instructional procedures by which the objectives are to be attained. Describe what supplementary staff is needed and how they function and what supplementary materials, supplies, consultant services, etc. are necessary to implement the project and in what way they are to be used.
>
> Specify in column g the major solution procedures to be used in meeting the performance objectives; that is, those procedures needed to make the required level of support a reality. Use emphatic sentences to specify the major solution procedures (example: We will do this thing). [Emphasis in original.]

One SEA has a policy which implies that LEA applications must provide very specific descriptions:

> The description [of the Title I staff duties in implementing the instructional techniques] should be sufficient to enable the reviewer of the application to determine the average daily routine of the Title I staff.

(The application form, however, allows only one-half page for this description.)

Policies such as those quoted above are deficient primarily in their failure to comprehensively identify the elements that should be included in the narrative descriptions. A better policy in this regard is the following:

> Give a narrative description of each instructional activity. Include the type and number of Title I assignments; special methods of instruction to be utilized; pupil/teacher ratio; class size; estimated amount of time each child will participate (minutes per day, days per week, number of weeks); instructional materials or equipment to be used; indicate whether there will be special Title I classes and, if so, describe how these will be scheduled into the regular school day; indicate whether there will be groupings of participants in regular classrooms and, if so, describe how this will be accomplished; describe how test data will be utilized in classroom planning; indicate how pupil skills development information will be exchanged by the Title I teacher and the regular classroom teacher.

A policy such as this, however, might be criticized as requiring too much information in the application; perhaps it would be sufficient if several of these items were simply included in planning documents retained by LEAs. We offer no final judgement on this point, as it falls outside our expertise. Our purpose is to identify the need for both comprehensive standards for LEA program design documents and clear standards as to the portion of that information that must be included in LEA applications. We recommend that new Title I regulations expressly require SEA program design manuals to establish both types of standards.

The discussion thus far has concerned policies governing descriptions of LEA instructional activities. Program design, of course, concerns many other issues. The most significant deficiency in most SEA oversight documents is their failure to address the full range of program design issues. Compliance with important legal requirements is not checked and inquiries into significant program quality factors are not made. For example, some application forms are concerned exclusively with program activities and do not cover program objectives. Some of those that require identification of performance objectives do not ensure that each element is specified. Thus, a relatively rare exception is the policy in one state which asks the following questions concerning each LEA objective:

1) Grade span?
2) When or by what time?
3) Who?
4) Will know or do what?
5) Under what conditions?
6) To what level of proficiency?
7) As measured or observed by what instrument or technique?

We recommend that new Title I regulations expressly require SEAs to prepare application forms which ask for basic information concerning each significant program quality variable and each program design requirement.

New regulations should also set specific standards in this area. All project objectives and major subobjectives should be listed on the application. Our survey and the GAO Report, moreover, found SEA policies to be particularly ineffective in ensuring that LEAs make proper use of research information in designing their programs. Supplementing our recommendation that SEAs establish systematic procedures for disseminating research information to LEAs, we recommend that LEA application forms be required to indicate which research findings disseminated by the SEA, if any, were incorporated into an LEA's program and to describe generally why any relevant findings not incorporated were felt to be "inappropriate" for use.

We also recommend that new regulations require SEAs to set standards concerning the more comprehensive program design information which LEAs must maintain in their records and require LEAs to sign an assurance on their applications that this information is maintained and available for SEA inspection.

B. Monitoring and Recordkeeping

Federal regulations (45 C.F.R. §100 b 431) require that SEAs "constantly monitor performance" of Title I grant activities, in order to assure adequate progress toward the goals of the grants. Since this monitoring must be undertaken for "each function or activity of each grant," on-site program reviews must be performed. Furthermore, LEAs must maintain records deemed "necessary" by the SEA (45 C.F.R. §116.23).

As in other areas, state monitoring and recordkeeping practices concerning program design vary to a great extent. Very few states have specific recordkeeping requirements; some have none. Those that do set recordkeeping requirements generally do so through their monitoring forms. For example, one state monitoring form asks the following questions (most of which are taken from the OE publication Title I ESEA: Conducting On-Site Visits:

> Do the services provided correspond to the documented needs of public school children? Of private school children?
>
> Is there a clear relationship between the results of the testing and design of Title I program? Does adequate documentation exist to establish the high priority needs for supportive services (review documentation)?
>
> Is there documentation of need for the particular in-service training which is offered?
>
> If consultants are being utilized on a day to day basis, is the amount of time they spend on this project being adequately documented? (Date, hours, and specific areas of work)

No state monitoring form covers every aspect of the Title I program design requirements. Some states have monitoring instruments which make only general inquiries into program design and implementation, e.g.,

> The project is particularly tailored to contribute substantially toward meeting one or more of the special educational needs of educationally deprived children as identified pursuant to Section 116a.21 and is not designed to meet the general needs of school or of the student body at large in a school or in a specified grade in a school.

and

> Is the staffing design adequate for the requirements of the project? Are program objectives written in measurable terms? Does it appear that the objectives included in the project application are being achieved?

In contrast, other states have more detailed monitoring instruments. One state asks the questions set forth below and calls for rated responses on a scale of 1 to 5, 1 being "no attempt to conform with guidelines and approved applications" and 5 being "implementation is outstanding."

> All teacher contracts agree with the application and/or personnel sheets and/or classification reports.
>
> Instructional and/or supplementary service activities are being implemented according to priority.
>
> Funds and services are being concentrated on areas of highest priority.
>
> Objectives are measurable, realistic, and consistent with identified needs.
>
> Provisions for staff dissemination are being implemented.
>
> Parents, in general, have had input into the planning of the program.

Parents, in general, have been involved in the implementation and operation of the program.

Estimated budget was realistic and used for program planning.

Staff members are aware of the objective(s) for the activity.

Staff is knowledgeable about or has ready access to information about students' achievement levels at entry into the program and other pertinent data.

There is evidence that the results of the previous evaluations have been used in the design of the current program.

The activity was implemented at the time indicated in the application.

Class size is within the guidelines and agrees with the approved application.

Length of instructional period is appropriate and in conformity with the approved application.

Professional staff assignments are in conformity with the approved application.

Non-professional staff assignments are in conformity with the approved application.

Instructional methods are appropriate and effective.

Non-professional staff members are being utilized effectively.

Joint in-service training is, was, or will be held.

Title I instructional materials, supplies, and equipment are appropriate.

Staff members are knowledgeable about Title I in general.

Effective SEA monitoring and LEA recordkeeping are crucial in ensuring proper LEA program design for Title I funded activities. Present state policies are not sufficiently comprehensive. Some are nearly adequate, others very deficient.

As stated earlier, new regulations should require that documentation of all aspects of program design be gathered and maintained on file for inspection purposes. We also recommend that federal regulations require SEA monitoring of all aspects of LEA program design, including each legal requirement and relevant quality variable.

CHAPTER 7

CONCENTRATION

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CHAPTER 7
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§141(a)(1)(B) of Title I requires that LEA projects be of "sufficient size . . . to give reasonable promise of substantial progress." The Title I regulations repeat this language in §116.18(a) and add in §116.18(e) the following provision:

> Applications for grants . . . are to be concentrated on a limited number of projects and applied to a limited number of educationally deprived children so as to give reasonable promise of promoting to a marked degree improvement in the educational attainment . . . of children.

These provisions reflect the judgment that Title I projects will not be successful if the available funds are either spread thinly to serve too many children or used to purchase too many services in such a way that the project participants' exposure to any one service is too brief to be effective.

A related provision prohibits "imprudent, extravagant or wasteful expenditures." Since such expenditures have the effect of either reducing the number of children that can be served with legitimate expenditures or imbalancing services in such a way that a comprehensive and varied program cannot be offered, this provision operates as a limit on the concentration requirement. Thus, while spreading funds thinly is a concentration violation, going to the opposite extreme and spending more than necessary amounts on too few children is "imprudent, extravagant or wasteful."

I. Introduction

The Title I concentration requirement affects the interpretation of several other Title I requirements, including targeting of attendance areas, targeting of children and program design. There are alternative means of ensuring concentrated expenditure of Title I funds. LEAs may limit Title I projects to a small number of schools or to a small number of the most severely educationally deprived children in a greater number of schools. A third alternative for LEAs is to offer instructional services in only a few general instructional areas (e.g., just in reading), thus enabling LEAs to serve either a larger number of students or attendance areas or both. (Aspects of this point are discussed in greater detail in the chapter on program development.)

This paper discusses the interpretations of the concentration requirement offered in federal documents, a federal court decision, and state policies. Our recommendations for new regulations are based on this analysis.

II. Two Types of Concentration Standards

Two types of standards have been employed in the enforcement of the concentration requirement. The first is a dollar allocation standard concerned with the overall number of dollars spent on each Title I project participant. The second type of standard is an educational effectiveness standard applied to each particular activity of a Title I project. This second type of standard consists of either one or a combination of more detailed quantitative indicators such as the pupil-teacher ratio for the activity, the frequency with which the activity is pursued, the duration of each activity period, the number of activity periods scheduled for the project and the availability of equipment and supplies (e.g., books per pupil, movie projectors per class, etc.).

A. The Federal Legal Framework

1. The Dollar Allocation Standard

§4.7 of Program Guide #44 offers a concentration standard of the first type; that is, a dollar allocation standard:

> The investment per child on an annual basis for a program of compensatory educational services which supplements the child's regular school activity should be expected to equal about one half the expenditure per child from state and local funds for the applicant's regular school program.

This dollar allocation standard was involved in the case of Nicholson v. Pittenger, 364, F. Supp., 669 (E.D. Pa. 1973). Finding the defendants in violation of Program Guide #44, the court stated:

> Defendants have not required . . . information from which it could be determined whether or not a program . . . is of sufficient size . . . . Defendants have established no criteria to determine whether or not there has been adequate concentration in terms of actual Title I expenditures per child . . . . Defendants have not required . . . that for every two dollars of state and local funds allocated to a school receiving Title I funds, there is approximately one dollar of Title I funds . . . . Therefore, we shall enjoin defendants from approving any Title I applicants for the school district.

The language of the "two-for-one" dollar allocation standard in §4.7 indicates that OE intended the standard to be directory rather than mandatory (despite the Nicholson court's interpretation).

2. Specific Quantitative Indicators Related to Educational Effectiveness

Program Guide #44 also offers a concentration standard of the second type -- an educational effectiveness standard concerning the adequacy of the staff resources devoted to a Title I project:

> The ratio of project staff to the number of children to be served should be high enough to provide concentrated individualized services.

While Program Guide #44 stresses the importance of providing concentrated staff services, no specific standard is offered.

3. Summary of Federal Legal Framework

OE has not formulated specific, comprehensive, mandatory standards for enforcing the concentration requirement. This has been intentional, reflecting OE's position that it is the responsibility of SEAs to take the initiative in promulgating standards to ensure sufficient concentration of Title I services.

B. State Policies

Several states in our survey have set minimum per pupil expenditures for Title I programs.

For example, in one state the instructions accompanying the Title I application include a $300.00 dollar figure to assist the district "in its determination of the total number of children that may be served." The state's monitoring instrument provides, among other things, that the adequacy of the per pupil expenditure must be reviewed. The LEA must allocate "at least $300.00 per child per activity, i.e., a child in reading and math components should receive an allocation of not less than $600.00."

In a second state the SEA has established $250.00 as the spending floor which is used, "as a strict budgetary guideline." In a third state the figure is $234.00. In a fourth, the minimum is $350.00 with a maximum set at $550.00, subject to the granting of a waiver by the SEA.

Several other states suggest that LEAs meet Program Guide # 44's two-for-one ratio. In nearly all of these states, however, actual practice does not conform with the SEA's suggested policy.

With respect to the second type of concentration standard, SEA policy making has been minimal. One state enforces a maximum ten-to-one pupil-teacher ratio or 14-to-one where an aide is also in the room. In another state, the maximum is 15-to-one, or 20-to-one with an aide, while a third state sets no specific standard and has policies which simply repeat Program Guide #44's command that staff allocations be adequate to provide individualized services. Other states have no policies at all in this area.

Most of the states in our survey have failed to take the initiative in formulating policies to enforce the concentration requirement. Most state policies that do exist are not firm requirements. Those states that have formulated firm requirements cannot be said to have comprehensively addressed all the issues relevant to ensuring that compliance with the requirements is directly related to the effectiveness of the services provided. The pupil-teacher ratio policies of the two states mentioned above apply inflexibly to every project regardless of the nature of the services offered.

C. Analysis and Recommendations

§4.7 of Program Guide #44 states:

> The greater the concentration of effort, as indicated by investment per child, the greater the likelihood that the program will have a significant impact on the children in the program.

The validity of this statement is currently a matter of controversy. SEA officials in one state said that there is "increasing evidence to show that a direct relationship does not exist between spending large amounts of money and individual student gain." A federal regulation establishing firm dollar allocation standards to enforce the concentration requirement would be vulnerable to this argument, if such an argument is correct. There is another problem with establishing a firm dollar allocation standard. Title I funds a great variety of services. In terms of actual effectiveness, the degree of expenditure concentration needed for one service may be quite different from that needed for another.

A very practical consideration, however, speaks in favor of a minimum federal dollar allocation standard. Two states in our survey reported that their LEAs are opposed to the concept of concentration. In one of these states, the SEA reported that due to a general lack of commitment to compensatory education in that state, any weakening of the concentration requirement would go a long way toward transforming Title I into a general aid program. A dollar allocation standard is an easily-enforced ratio, which, for all its faults, can ensure basic compliance with the requirement that funds not be spread too thinly.

It is apparent, however, that the practical considerations which urge the establishment of a firm dollar allocation standard could be satisfied if new regulations were to focus instead upon the second type of standard for enforcing the concentration requirement -- more specific quantitative indicators applied to each project activity. Standards setting maximum pupil-teacher ratios, minimum duration and frequency standards for activities, standards concerning the availability of non-staff resources to project participants, and similar requirements would necessarily result in adequate concentration of expenditures. These standards, moreover, could be flexibly applied to different types of activities more easily than a simple dollar allocation standard.

We recommend that new regulations expressly require SEAs to formulate and enforce minimum quantitative standards specifically addressing a variety of factors relevant to the educational effectiveness of Title I programs. New regulations should require SEAs to inform LEAs of the quantitative indicators which will be considered in analyzing the extent to which each activity proposed for a Title I project is a concentrated effort likely to promote marked improvement in educational attainment. Information relevant to each of these indicators should be required in each LEA application. New regulations should require state policies to recognize that a profile of quantitative indicators appropriate for one activity will not necessarily be appropriate for a different activity and should require LEAs to explain why the design of each activity is optimal with respect to the relevant quantitative indicators.

Enforcement of the concentration requirement in this manner would focus attention on the educational effectiveness of actual services rather than the mere amount of money available to each child. It would also serve as an adequate safeguard against spreading funds too thinly but would avoid the objections to dollar allocation standards raised by the research evidence identified by the SEA quoted earlier.

We also recommend, however, that OE systematically study the evidence concerning the so-called "critical mass" theory of compensatory education expenditure. If educational research supports the establishment of a dollar allocation standard, OE should implement those findings in appropriate regulations. The limits of our expertise do not permit us to make a specific recommendation as to the educational validity of the critical mass theory.

III. Avoidance of Imprudent, Extravagant or Wasteful Expenditures

§116.18(a) of the regulations requires that the budget for a Title I project "avoid imprudent, extravagant or wasteful expenditures which would tend to defeat the intent of the Act." OE has formulated no express standards interpreting this regulation. The phrase "which would tend to defeat the intent of the Act," if literally interpreted, subjects LEAs to a potentially broad and ill-defined liability. We recommend that OE systematically reivew all exception letters, audits, or similar documents that have invoked this regulation in the past, and based on this examination, prepare and disseminate to SEAs examples of expenditures which OE would judge to be in violation of this regulation. In addition, we recommend that new Title I regulations set more specific standards interpreting this provision. We recommend that these standards include, at a minimum, the following two principles:

1) A particular expenditure violates the regulation if it costs so much -- and is not sufficient by itself to raise educational attainment -- so that funds are unavailable for other project components needed to ensure that the project as a whole shows reasonable promise of accomplishing its performance objectives.

2) A particular expenditure violates the regulation if it purchases something so long lived but limited in the scope of its utility that there is a significant likelihood that at some point during the life of the purchase, it will be useful for only low priority concerns as indicated by the needs assessment.

None of the states in our survey has comprehensively addressed the problem of interpreting §116.18(a) of the regulations. The most common state policy in this area (but one used only by a minority of the states in our survey) is the establishment of budget limits for particular types of expenses. An SEA policy in one state, for example, requires special justification for any expenditures for capital outlay equipment in excess of 6% of the total program budget. A similar standard for materials and supplies is set at 10% of the total budget. In a second state, only 5% of an LEA's budget may be spent on administrative expenses; in a third state the amount is 10%; in a fourth state only 25% of a summer program budget may be spent on transportation. Other states in our survey do not enforce budget limits and have no specific policies concerning the avoidance of imprudent, extravagant or wasteful expenditures. This is an area in which the states are in need of better regulatory guidance.

CHAPTER 8

EVALUATION

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EVALUATION

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§ 141(a)(6) of Title I requires LEAs to formulate

> effective procedures, including provisions for appropriate objective measurements of educational achievement . . . for evaluating, at least annually, the effectiveness of the programs in meeting the special educational needs of educationally deprived children.

Other statutory and regulatory provisions establish standards concerning the manner in which Title I evaluations must be conducted. These provisions also set standards for the enforcement of the evaluation requirement.

I. Introduction, Major Issues, Conclusions and Recommendations

Federal and state documents establish standards concerning the purposes of Title I evaluations, the relationship of evaluation to program design, the means for conducting evaluations, evaluation planning procedures, use of Title I funds for evaluation purposes, and the enforcement of all of these standards through SEA oversight mechanisms. The body of this paper discusses the federal standards applicable in each of these areas, the additions and interpretations which state policies have made, and the recommendations of the Legal Standards Project concerning each component of the evaluation requirement. The body of the paper is introduced by the following sections which summarize our conclusions in each of the areas listed above.

A. The Purposes of the Evaluation Requirement

The evaluation requirement has two purposes: (1) objective measurement of the extent to which project objectives and subobjectives have been met; (2) analysis of why project activities or services were, or were not, successful and how future programs might be made more effective. Though both of these purposes are clearly indicated in the statute and regulations, most state policies implement only the first purpose and neglect the second. We recommend that new Title I regulations clearly indicate that Title I evaluations must attempt to determine why projects failed or succeeded, not just simply whether they did so.

B. The Relationship of Evaluation to Program Design

As indicated in the chapter on program development, needs assessment, program design, and evaluation constitute an information and decision-making feedback cycle which continuously increases the relevance and quality of Title I programs. Evaluation efforts must be comprehensive, covering each performance subobjective and objective and each activity or service. Major events in the evaluation process (e.g., standardized testing or other major testing) must be timely so that the data gathered may be properly used in program planning. To this end, evaluations must be written in understandable language, be disseminated to program design decision-makers and contain clearly expressed conclusions and recommendations. All of these principles are either expressly or implicitly required by the Title I legal framework. State evaluation policies, however, have not implemented them fully. New regulations should expressly set forth these principles to ensure that SEA policies implement them.

C. The Means of Evaluation

Different means must be utilized to accomplish different portions of the evaluation requirement. To evaluate the accomplishment of objectives in general instructional areas, objective measures and uniform procedures generating data comparable on a nationwide basis must be used. Objective measures must also be utilized to determine the extent to which project subobjectives have been achieved. Uniform procedures are not required for this purpose, however, due to the extreme variety and diversity among different LEAs' subobjectives. For purposes of ongoing program modification, subjective, individualized, and fine-grained objective assessment means are appropriate.

The validity and detrimental side effects of tests or other assessment means are important Title I concerns. The statute requires that the means utilized to evaluate Title I projects be "appropriate." Despite the importance of these issues, OE documents and state policies have not established standards for judging the appropriateness of alternative assessment devices in light of the differing purposes of the evaluation requirement and the potential harm that misuse of testing devices might cause. New regulations should clearly address these issues so that LEAs may be guided in selecting "appropriate" means for evaluating their Title I programs.

D. Evaluation Planning Procedures

New Title I regulations should expressly require the involvement of Title I staff members in the formulation of the evaluation design. (The statute and regulations already require parent involvement in this area.) New regulations should also require SEAs to ensure that LEA budgets include adequate resources to successfully carry out evaluation plans. Both of these principles are stressed in state and federal documents, but SEA policies, in many states, are inadequate to ensure that these principles are implemented.

E. Use of Title I Funds for Evaluation Purposes

Title I funds may be used to conduct evaluations. An issue has arisen, however, concerning the use of Title I funds to pay for the evaluation of members of a control group who are not project participants and who may not reside in eligible attendance areas. We recommend that OE expressly clarify in new regulations that Title I funds may be used for such purposes.

F. Oversight Mechanisms

New regulations should establish several standards for enforcing the evaluation requirement through application approval, monitoring and recordkeeping processes. These standards should clearly indicate the manner in which each oversight mechanism applies to each portion of the evaluation requirement. This is necessary to ensure that SEAs are able to fully meet their oversight obligations and to ensure that an adequate but not overly burdensome amount of information is included in LEA applications.

II. The Purposes of the Evaluation Requirement

The statute (§141(a)(6)) and regulations (§116.22(a)) clearly indicate that the program evaluation requirement has two parts and two purposes. The first part of the evaluation requirement states that LEAs must make "appropriate objective measurements" of the extent to which the objectives and subobjectives of their Title I programs have been met. The purpose of these measurements is to determine whether Title I projects have been successful.

The second part of the evaluation requirement states that in addition to making objective measurements of the degree of program success, LEAs must also establish other "effective procedures . . . for evaluating . . . the effectiveness" of their Title I activities and services. The purpose of this part of the evaluation requirement is to ensure that LEAs systematically gather and analyze information concerning why any program activities and services were, or were not, successful and how future programs might be made more effective.

Most of the SEA evaluation policies we surveyed do not adequately implement the second part of the evaluation requirement. They usually enforce only the first part and do not ensure that LEA information gathering and analysis procedures will address the reasons why unsuccessful project components have failed.

A notable exception is one state which has a policy expressly implementing the second part of the evaluation requirement. This policy calls the second aspect of the evaluation a "process evaluation" which applies to Title I activities and services, which are called "solution procedures." Under the policy, LEAs must perform a process evaluation to determine "whether the solution procedures are enabling the school to accomplish its objectives for each component" of the project.

Many states, instead of having policies which rigorously analyze the success or failure of Title I projects, have policies which focus LEA evaluations on fiscal accountability or compliance with Title I legal requirements. In fact, one SEA in our survey reported that fiscal accountability, not educational achievement or the effectiveness of activities and services is the primary purpose of LEA evaluations. OE has failed to adequately inform SEAs that information indicating fiscal integrity and legal compliance with the provisions of Title I is no substitute for rigorous evaluative analysis as to why programs failed or succeeded and how the quality and effectiveness of Title I programs might best be improved.

New Title I regulations should be re-worded to expressly emphasize both parts of the Title I evaluation requirement. Analytical evaluation of the effectiveness of Title I activities and services is a major area in which most state policies are inconsistent with the requirements of the Title I legal framework.

III. The Relationship of Evaluation to Program Design

Evaluation and program design are directly linked. The evaluation determines the extent to which performance objectives established by the program design process have been attained and analyzes project activities and services to determine whether they are effective means of accomplishing performance objectives and subobjectives. To be sufficiently comprehensive Title I evaluations must measure the degree of attainment of each objective and subobjective and analyze the contribution of each activity and service to the success or failure of the project.

Federal documents identify each of these requirements. §141(a)(7) of the statute indicates that Title I evaluations must be designed "in accordance with specific performance criteria related to program directives." OE's On-Site Visit Handbook asks SEAs to ensure LEAs offer "evidence that the evaluation design relates directly to needs and program objectives." OE's technical assistance packet on Title I performance objectives analyzes this requirement in greater detail:

> The measures of program impact written into performance objectives establish, prior to the implementation of the program, the criteria by which the program will be evaluated . . . . By describing in specific terms which children will be served, what needs the program will address, the level of outcome expected, and when performance will be measured, performance objectives delineate, or prescribe, the nature of program evaluation:
>
> o "who will be served" translates into "who will be analyzed"
>
> o "what need is being addressed" translates into "what behavior will be recorded in evaluation"

- "how much performance is expected" translates into "what level will be evaluated by what instrument or instruments" and
- "when will performance be measured" translates into "what date or dates will the evaluation be conducted."

§6.1 of Program Guide #44 stresses the requirement that Title I evaluations be comprehensive:

> The Title I application must include a description of the methods and procedures to be used to evaluate each major activity.

Three states in our survey have expressly stated in their Title I policies that the evaluation must apply to each subobjective and objective of the Title I program. Similar policies are implicit in other states we surveyed, but a significant minority of states do not have policies which ensure the comprehensiveness of LEA evaluations.

We recommend that new Title I regulations expressly require evaluations to be comprehensive and that to meet this requirement, they must (1) measure the extent to which each project objective and subobjective has been attained; (2) evaluate the effectiveness of each activity or service to determine the extent of its necessity and sufficiency for accomplishing the subobjectives or objectives it was designed to serve; and (3) attempt to uncover the reasons why activities or services were successful or unsuccessful so that, if necessary, alternative strategies showing greater promise can be formulated.[152]

Just as Title I evaluations are based directly on project objectives, subobjectives, activities and services, the design of Title I projects is based, in part, on past Title I evaluations. Needs assessment, program design, and evaluation form a continuing feedback cycle which leads to the improvement of Title I programs. This means that Title I evaluations must be used in the program design process. To serve this purpose, Title I evaluations must contain analyses, conclusions, and recommendations for program changes. Evaluation information and data must be gathered in time so that it can be used; evaluation reports must be disseminated to participants in the program design process, and the reports must be written in terms that are understandable by them. Federal documents stress all of these points. (The requirement that Title I evaluations be used in the program design process and the implications of that requirement for ensuring the timeliness of evaluation data gathering and analysis are discussed in the paper on program design. The discussion which follows concerns the other issues.)

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[152] While the legal framework clearly identifies these aspects of comprehensive evaluations, it does not

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(footnote continued from previous page)

clearly indicate the manner in which each should be performed. This is the subject of the next section of this chapter, concerning evaluation means. Detailed recommendations in this area are beyond the reach of our expertise, though with respect to evaluating the effectiveness and extent of the contribution of non-instructional services (e.g., food, clothing) it is apparent that the rigor of the analysis cannot be expected to be greater than that of the needs assessment which led to the decision to provide non-instructional services in the first place. LEAs need not condemn some children to malnutrition in order to have a "scientific control group" for evaluating the effectiveness of food services. The subjective impressions of staff members as to changes in the attentiveness of children provided food services are undoubtedly worth gathering, and reconsideration of the assumptions behind the food service component in light of the experience gained through implementation should certainly take place; but most of the evaluation of food services is likely to concern such issues as whether the food was, in fact, nutritious, whether those who needed it got it, whether stigmatization problems arose, and whether the distribution system was efficient or wasteful.

OE's document, Title I ESEA: How It Works, analyzes the features which Title I evaluations must have in order to be usable for program design purposes. At 38-39, this document indicates that three of the "six essential elements in an evaluation design" are data analysis, conclusions and recommendations:

> Parents should be sure evaluation results are presented in understandable terms so they can judge the success or failure of the program for themselves . . . . An analysis of the data will lead to certain conclusions about how well the project met its objectives . . . . An evaluation should not end with the submission of a report on the conclusions based on an analysis of test data. The conclusions and the data upon which they are based should be used to make recommendations for program improvements, expansion, or revision . . . . If the evaluation shows that the program did not fulfill the objectives set, then the program needs to be revised . . . . Whatever the reasons, a negative evaluation report demands some changes before a similar project should be funded. On the other hand, a favorable evaluation report can mean one of two things: the project was so successful that help in this area is no longer needed; or the project successfully met the needs of a small group of children and, based on this success, should be expanded to include more children the next year.

We recommend that new regulations expressly include these points.

IV. Evaluation Means

The current Title I legal framework contains several provisions governing the means that must be employed in Title I evaluations. The basic requirement, contained in §141(a)(6) of the statute, requires that the procedures used be "effective." Also, the procedures must include "objective measurements." §151(g) of the statute adds that OE evaluation reports submitted to Congress (based on LEA and SEA evaluation reports) must be based "to the maximum extent possible on objective measurements." §116.22(a) of the regulations indicates that the objective measurements utilized must be "appropriate."

§151(d) of the statute requires LEAs to utilize "uniform procedures and criteria" developed by OE. §151(f) adds that these procedures and criteria must be capable of "producing data which are comparable on a statewide and nationwide basis."

To be fully understood, these provisions require interpretation. There are circumstances in which the most "appropriate" or "effective" evaluation means would not be the "uniform procedures and criteria" formulated by OE. Clearly, the unique subobjectives an LEA might establish could not be evaluated in such a way as to generate "data comparable on a statewide and nationwide basis."

For some Title I evaluation purposes, moreover, the most "effective" or "appropriate" evaluation means might not be "objective measurements." Day-to-day evaluations of the effectiveness of Title I services and activities for example, might depend significantly on the subjective analyses of the Title I staff.

New Title I regulations should clarify these matters. They should indicate that while evaluation procedures must include objective measurements, such measurements alone do not fully satisfy the statutory provisions. New regulations should also clearly indicate that the uniform procedures and criteria requirement applies only to the evaluation of objectives covering general instructional areas and that project subobjectives, while they must be evaluated by objective means, need not be included in the procedures utilized to evaluate broader objectives. (These points are discussed in the chapter on program development.)

OE has not provided significant guidance to SEAs concerning the interpretation of the requirement that evaluation means be "appropriate" or "effective."[153] Title I ESEA: How It Works, at 38, discusses the issues of sampling and discriminatory tests:

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[153] Neither has OE provided adequate guidance to SEAs regarding the evaluation means qualifying as "objective." Is a rating scale used by a teacher objective? Are letter grades? New regulations should address this issue.

> An evaluation should consider the effect of a project on all participating students but in a school district where thousands of children are involved in a single project, it may be impossible to gather data on all these children. In such cases, the evaluation will be based on a sampling that is a small portion of the participants. Parents should be sure the sampling is representative of the total number of children. . . . It is also important to see that measuring devices do not discriminate against any children. For instance, if a school district has a large Spanish speaking student population, perhaps tests should be administered in Spanish. Parents should question school officials about how measuring devices were chosen to be sure the devices are fair.

Also, OE 35079, at 39, warns:

> Public Law 89-10 states that whenever possible 'objective measures of educational achievement' will be used for the evaluation. In many instances, this will mean nationally standardized tests. Extreme care must be taken, however, to assure that the standardized tests are valid measures of the types of behavior change indicated by the objectives.

None of the states in our survey has comprehensively interpreted the provisions of the Title I legal framework governing evaluation methodologies. Half the states in our survey require LEAs to utilize standardized tests in the evaluation of their projects. One state requires LEAs to utilize one of ten tests selected by the state.

One state expressly allows LEAs to limit their evaluations to a sample of the projects' participants. A second state, on the other hand, requires that all students be included in LEA evaluations. Most state policies we surveyed imply but do not expressly state, that all project participants should be included in evaluations.

One state which requires the utilization of norm-referenced tests expressly recognizes the need to utilize additional means:

> Whereas information regarding objectives and major activities may be adequate for reporting to local citizens and state agencies, such data are often too general to be useful to the project staff in making whatever planning changes are necessary to increase the effectiveness of the project . . . . Criterion referenced tests which measure pupil success in meeting . . . objectives offer a rich source of data for developing more effective projects . . . . The records kept by instructional staff may contain data indicating variations in instructional treatment; i.e., what learning materials and what personnel were used with specific pupils. Questionnaires constructed and field tested in accordance with recognized standardized procedures are often useful in measuring attitudes of pupils, parents, and staff . . . . There are many techniques and procedures for evaluating the effectiveness of supportive components. Some of the more common include questionnaires, checklists, rating scales and summarized anecdotal records. In addition to their use with pupils, such instruments should be utilized to gain information from instructional staff, parents and community advisory groups.

Another state which requires utilization of standardized tests also recognizes the need to utilize alternative assessment means:

> Information collected from non-standardized tests and other sources should be included. The information should be collected at regular intervals or on clearly identifiable occurrences.

None of the states in our survey, however, has a comprehensive policy designed to ensure that LEAs utilize appropriate assessment means for evaluating the attainment of objectives and subobjectives and for analyzing the effectiveness of project activities and services. New Title I regulations should thoroughly address the evaluation issues relevant to ensuring compliance with the full scope of the statutory provisions. New regulations should indicate that LEA evaluation efforts must include more than utilization of standardized tests. New regulations should also indicate that all project participants must be included in the evaluation but that the portion of the evaluation which follows OE uniform procedures and criteria for the purpose of generating nationally comparable data may utilize a representative sample of the participants.

As we recommended in the chapter on needs assessment, OE should carefully consider the controversial issue of test validity and the potentially harmful side effects of test utilization. One state's evaluation form addresses this issue, requiring program monitors to determine whether

> the Title I project evaluation as planned, approved and conducted is satisfactory as it pertains to:
>
> 1. the training and preparation of the tester;
>
> 2. the testing environment (physical and physiological) for the students;
>
> 3. the attitude and behavior of the students during pre and post testing;
>
> 4. the instrument used; i.e., it was reliable for students tested and valid for the instructional program implemented in the classroom.

Though this state policy reflects concern for the important issues it addresses, it offers little guidance as to the factors which on-site monitors should consider and no standards on which they should base their conclusions. Though the limits of our expertise do not allow us to make precise recommendations, we anticipate that standards addressing test issues in greater detail will be necessary.

V. Evaluation Planning Procedures

Evaluation planning is part of the program design process and the discussion of planning procedures and participants included in the program design chapter is relevant here. Two points concerning evaluation planning are particularly stressed by federal documents: 1) the necessity of involving the Title I staff in evaluation planning; and 2) the need the ensure that adequate resources are allocated to carry out the established plans.

OE's handbook on Conducting On-Site Visits, at 22, asks SEAs to check whether "the teaching staff [was] involved in the development of the evaluation design." OE's technical assistance packet on Title I-Performance Objectives indicates that one of the important purposes of this involvement is to ensure the formulation of realistic objectives toward which the staff will feel a sense of commitment. We recommend that new regulations reflect these considerations by expressly requiring the involvement of Title I staff in important aspects of evaluation planning.

§6.1 of Program Guide #44 requires SEAs to "determine the adequacy of the resources the local educational agency expects to use in carrying out the evaluation of its major program activities" and ensure that "adequate staff and other resources will be provided to implement the procedures." One SEA official in a state included in our survey reported that she was the only "resource person" in her state in the field of evaluation and that there were LEAs in the state "without any evaluation staff." We recommend that new regulations expressly incorporate the requirements of §6.1 of Program Guide #44 to clearly inform SEAs that allocation of inadequate resources for evaluation is inconsistent with the Title I legal framework.

VI. Use of Title I Resources for Evaluation Purposes

Evaluation efforts are generally, and correctly, viewed as legitimate Title I expenses; but some persons have questioned whether Title I funds may be used to evaluate a control group which consists, of course, of children who are not project participants. They see the issue as related to spending Title I funds to test general groups of children to find out which of them are educationally deprived (a practice inconsistent with the Title I legal framework as we indicated in the chapter on needs assessment).

The two issues are different in significant ways. First, a proper control group for a Title I evaluation are children who are educationally deprived while needs assessment testing of general groups necessarily involves spending money on ineligible children. Second, a control group is a very small number of children compared to the number of children who might be involved in the first step of a needs assessment, and the purpose of the control group is to serve as a base against which the performance of program participants is measured. While needs assessment testing of non-educationally deprived children is of no benefit to project participants, the inclusion of a control group in the evaluation design directly serves the needs of targeted children.

In many cases the control group will be educationally-deprived children in eligible, but non-targeted, attendance areas. In such a case the control group will consist of eligible children. Clearly, evaluation of such a control group is permissible. Should control groups be limited to eligible children?

We think not. Such a policy would make it impossible for LEAs to target all children in eligible areas who are below a particular cut-off point on an indicator of educational deprivation. (The LEAs would have to single out a group of children that would normally receive services under such a policy and use them as an un-served control group; this would be arbitrary discrimination against the members of that group.) Since all properly selected control groups directly serve

Title I purposes, we recommend that new regulations expressly permit the use of Title I funds to evaluate a control group, even if the group is in an ineligible attendance area.

VII. Oversight Mechanisms

Under the current legal framework, LEA applications must describe procedures and techniques used to evaluate, at least annually, the effectiveness of the Title I program in meeting the special educational needs of educationally deprived children, specifically include appropriate objective measurements of education achievement (45 C.F.R. §116.22(a)). Each LEA must also submit an annual report containing sufficient information for meaningful SEA review, to include measurements of educational achievement and program effectiveness (45 C.F.R. §116.23). LEA program and fiscal records determined necessary by the SEA must be maintained and made available for verification of these reports.

Because the Title I evaluation requirements are general in scope, many state application forms vary in the extent of their inquiry into LEA evaluation methods and results. Some states merely require a description of the evaluation design for the project. A minority of states surveyed make more detailed inquiries which, nevertheless, vary in comprehensivenss. For example, one state form requests the following information:

1. Specify the evaluation design to be used, including formal and informal evaluations method, test, records, observations, etc.
2. Indicate how the evaluation design will provide periodic checks to detect discrepancies between obtained progress and anticipated progress toward the accomplishment of the objectives. Indicate also what alternatives are to be followed in our changing program design if and when discrepancies occur.
3. Identify district personnel or outside consultants or agencies to be utilized in evaluation of your project.

Another state application form makes similarly detailed inquiries but includes both objective measurements and measures of effectiveness in a manner consistent with both the Title I legal framework and our recommendation in that regard, viz.:

Evaluation of School Program

1. Describe in column B the instruments or methods that will be used for product measurement in each component; that is, the instruments or methods to be used in measuring whether or not the objective for each component has been met. Enter the dates for pretesting, interim-testing, and post-testing in the appropriate spaces in column C. If the school is conducting a bilingual education program, be sure to identify the methods or instruments for both languages.

2. Describe in column D the methods to be used in process evaluation; that is, the methods to be used in determining whether the solution procedures are enabling the school to accomplish its objectives for each component. NOTE: If the methods to be used in the process evaluation are included in the Event Schedule, completion of this column is not necessary.

3. Identify by placing an X in the appropriate boxes and typing the name(s) in the spaces provided those persons who will evaluate the total program.

4. Identify by placing the appropriate symbol (A.B.C, and so forth) in column E the person(s) who will evaluate each component. If the evaluator(s) is (are) bilingual in the languages of the bilingual education program, place an asterisk (*) by the name(s).

Dissemination of Evaluation

1. Use the form on page 9 to schedule the reports of the results of program evaluation to parents and other community members, the advisory committees, and so forth.

2. Reports may be made by newsletter to parents and community; by informal, written or oral reports, such as a presentation by the reading source teacher to the School Advisory Committee on the current progress of the reading program; by formal written or oral reports, such as the presentation of the results of the on-site program review to the governing board of the school district by the school principal, by media releases, such as an article in the local newspaper describing the success of the parent volunteer program; and so forth. Enter the interval of the reports - monthly, bimonthly, quarterly, and so forth - in the appropriate box. For example, if newsletters are to be sent monthly to parents and other members of the community, type "monthly" in the

first box below "newsletter"; if informal reports are to be made bi-monthly to the School Advisory Committee, type "bi-monthly" in the third box under "Informal Reports".

3. Use the spaces under "Other" and/or the space below the chart to schedule or describe dissemination plans in more detail.

4. Indicate by placing an asterisk (*) by the interval of report whether the report is available in the language other than English of the bilingual education program.

In addition to the regulatory provisions which establish the application approval process, 45 C.F.R. §100.431(b) requires SEA monitoring of LEA compliance with each grant activity funded under Title I. This requires SEA on-site review, although the annual LEA evaluation report also plays a role in the monitoring process.

State approaches in monitoring LEA evaluation vary in depth and scope. Some states' monitoring forms contain only general and conclusory inquiries, e.g., "To what extent (degree) has the LEA adhered to the evaluation procedures outlined in the proposal?" Other states' inquiries are more detailed, but far from comprehensive:

> Does it appear that objectives included in the project application are being achieved?
>
> Is there evidence that evaluation results are being used in program development?
>
> Is the evaluation design an integral part of program planning?

Finally, some states monitor many aspects of LEA evaluations:

EVALUATION

	YES	No
1. Do the number of dropouts given in the evaluation agree with the LEAs' documentation? (Visiting teacher's report, session report, worksheets)	______	______
2. Are pre- and post-test scores being recorded for each Title I participant? (List of participants, test scores, interviews)	______	______
3. Is there documentation to demonstrate the number or percent of students who at least reached the program objective (and those who didn't) worksheet	______	______
4. Does the LEA have an effective plan for the utilization of Spring testing data for the following personnel?		
Parish coordinator	______	______
Teachers	______	______
Guidance counselors	______	______
Supervisors	______	______
Master teachers	______	______
Teacher aides	______	______
5. Is there evidence that the teaching staff was involved in the development of the evaluation design and the development of objectives? (records of meetings, interviews)	______	______
6. Is there evidence of an ongoing evaluation program? (Interviews, in-service records, program changes)	______	______
7. Has the evaluation been disseminated to the Title I staff, school board, and Title I Advisory Committee?	______	______
8. Is there evidence that changes have occurred in the Title I program because of suggestions or recommendations of the previous year's evaluation? (Records of teacher meetings, interviews, program changes, concentration)	______	______
9. List the items in this section in which the LEA needs assistance and/or improvement and comment on those items which need further clarification.	______	______

On-site monitoring policies such as these are also facilitated by recordkeeping requirements. Several states require that supportive records underlying the LEA application and evaluation report, e.g., test results and instruments, be maintained on file for a set number of years.

We recommend that new Title I regulations establish standards concerning the extent to which each evaluation legal requirement must be covered by application approval, monitoring, and recordkeeping processes.

In our program design recommendations we stated that each element of an LEA's objectives and subobjectives should be stated on the application form. Two of the four elements concern the evaluation design. New regulations should set similarly explicit standards concerning other information which must be included in application evaluation reports, and LEA records. Monitoring forms should be designed to check all of the evaluation information required to be kept in LEA files.

CHAPTER 9

SUPPLEMENT, NOT SUPPLANT
AND EXCESS COSTS

CHAPTER 9
SUPPLEMENT, NOT SUPPLANT AND EXCESS COSTS PROVISION

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CHAPTER 9
SUPPLEMENT, NOT SUPPLANT AND EXCESS COSTS PROVISIONS

I. Introduction

A. Overview of the Federal Legal Framework

1. Basic Purpose of the Provision

The basic purpose of the "supplement, not supplant"[154] and excess costs provisions[155] in the Title I statute is to ensure that Title I funds are used to provide and pay only for supplementary programs designed to meet the "special" educational needs of educationally deprived children residing in poor areas. These provisions prohibit LEAs from discriminating against project areas and children participating in Title I programs in the provision of state and local funds because such areas and children are receiving federal assistance.

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[154] The "supplement, not supplant" provision was added to the Title I statute in 1970, even though the basic structure of Title I has always required that Title I funds must supplement and never supplant state and local funds. The Senate Committee Report No. 91-634 accompanying the amendments adding the supplanting provision explained, "under present law there is no specific prohibition against supplanting State and local funds with federal funds even though supplanting would be inconsistent with the theory of Title I. Title I funds are intended to be supplementary to the education program generally offered by the States and local educational agencies." 1970 U.S. Code Cong. and Adm. News 2781.

[155] The excess costs concept has been included in the federal legal framework since 1968. (See Section 4.1 of Program Guide No. 44. The provision was added by the 1974 amendments to further clarify the supplementary nature of Title I. House Report No. 93-805, 1974 U.S. Code Cong. and Adm. News 4108.

In other words, the "supplement not supplant" provision explains that project areas and participating children must be provided the level of state and local funding that would be provided if Title I funding were not available. The existence of Title I funds may not be taken into consideration when the school district distributes state and local funds to school attendance areas and when the project area schools allocate state and local funds to programs for the children enrolled in their respective schools.

Thus, the supplement, not supplant regulations provide that the use of grant funds may not result in a decrease in the level of state and local funds that "would be made available" but for the existence of Title I funds and neither project areas nor children participating in programs funded under Title I may be "penalized" in the application of state and local funds because of the existence of Title I funds. Title I funds can only be used for the "excess costs" of programs.

Furthermore, the Title I legal framework provides that in no case may Title I supplant, i.e., replace the level of state and local funds that would have been made available but for the existence of Title I.

2. Relationship Between the "Supplement, Not Supplant" and "Excess Costs" Provisions

The relationship between the supplement, not supplant and excess cost provisions can best be understood if the basic conceptual underpinnings of the provisions are clear. As stated above, these provisions are intended to ensure that project areas as well as children in those areas actually participating in programs funded under Title I are not discriminated against in the application of state and local funds because of the existence of Title I. These provisions do not prohibit the rendering of any particular service to educationally deprived children; they simply explain the funding source which must be employed, Title I versus state and local.

The excess cost provision is simply an extension or clarification of the supplanting provision. Title I funds are to be used to pay for supplementary services. Phrased differently, Title I funds can only be used to pay for the excess costs or supplementary aspects of a program.

3. Language of the Statute

The supplement, not supplant provision set forth in the Title I statute, Section 141(a)(3)(B) provides:

> "Federal funds made available under this Title will be so used (i) as to

> supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this Title, and (ii) in no case as to supplant such funds from non-Federal sources.

The excess cost provision (Section 141(a)(1)) simply states that "payment under this title will be used for the excess costs of programs and projects...". The term is defined to mean

> those costs directly attributable to programs and projects which exceed the average per pupil expenditure of a local educational agency in the most recent year for which satisfactory data are available for pupils in the grade or grades included in such programs or projects... .[156]

4. The Federal Regulations and Guidelines

The regulations implementing the "supplement, not supplant" provision set forth in 45 C.F.R. §116.17(h)(1974) are virtually identical to the regulations issued in 1968 implementing the mandate that Title I funds be used to meet the "special" educational needs of ecuationally deprived children (45 C.F.R. §116.17(h)(1968)).

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[156] Section 403(17) of P.L. 81-874. The definition excludes state or local programs for educationally deprived children, or expenditures for bilingual or special education programs for handicapped children.

The existing regulations provide:

> Each application for a grant under Title I of the Act for educationally deprived children residing in a project area shall contain an assurance that the use of the grant funds will not result in a decrease in the use for educationally deprived children residing in that project area of State or local funds which, in the absence of funds under Title I of the Act, would be made available for that project area and that neither the project area nor the educationally deprived children residing therein will otherwise be penalized in the application of State and local funds because of such a use of funds under Title I of the Act. No project under Title I of the Act will be deemed to have been designed to meet the special educational needs of educationally deprived children unless the Federal funds made available for that project (1) will be used to supplement, and to the extent practical increase, the level of State and local funds that would, in the absence of such Federal funds, be made available for the education of pupils participating in that project; (2) will not be used to supplant State and local funds available for the education of such pupils;

In addition to the OE policy pronouncements set forth in the regulations, OE has issued "basic criteria" in the form of program guides which further clarified the meaning and scope of the supplement not supplant and excess costs provisions. The relevant program guides includes: Section 4.1 and Section 7.1 of Program Guide No. 44 issued on March 18, 1968, Program Guide No. 45 issued on June 14, 1968, Program Guide No. 45A issued on July 31, 1969, and Program Guide No. 57 issued on February 26, 1970. Program Guide No. 57 superseded Section 7.1 of Program Guide No. 44, all of Program Guide No. 45 and that portion of Program Guide No. 45A pertaining to comparability.

The excess costs concept first appeared in the Title I legal framework in 1968 as Section 4.1 of Program Guide No. 44. That section provides:

'Consideration has been given to the relationship of the Title I program to the regular school program and to the possibility of modifying that program so as to provide a better base for the addition of supplementary compensatory educational services.

Authority: 20 USC 241e(a)(1)

> Probably the most obvious indication of a child's need for special educational assistance under Title I is his inability to respond constructively to the regular school program. In many cases this program can be modified and integrated with the services to be provided under Title I so as to provide the child with a total program adapted to his special needs. In this connection, the requirement that applicants maintain regular school programs in the project areas at the same levels as they would have been maintained if Title I funds were not available applies only to expenditures and not to the program itself.

The Title I program, if it is to be truly supplementary, must be designed to extend and reinforce the regular school program. Insofar as possible, the regular school program, the Title I program, and any other special programs should be designed as a total program to meet the needs of the children to be served. This may require revision of the regular school curriculum and will in any event require communication between regular school and Title I staff concerning their respective programs and the ways in which they can be improved to better meet the needs of the educationally deprived children involved in both programs."

B. Purposes and Organization of this Chapter

This section of the paper is organized into two subsections. The first subsection describes and analyzes that aspect of the supplanting provision concerning discrimination against project areas in the provision of state and local funds. The second subsection concerns discrimination against children participating in programs funded under Title I in the provision of State and local funds (intra-school supplanting).

Each subsection will offer a description of the federal formal legal framework, describe the informal legal framework, describe the various state interpretations of the federal requirements, and finally analyze both the federal and state policy pronouncements. The analysis will include a discussion of the clarity of the supplanting and excess costs provisions, whether the provisions are overly restrictive, the conceptual and practical problems identified by SEAs, and then offer recommendations for improving the provisions.

C. Major Findings, Conclusions, and Recommendations

The "supplement, not supplant" and "excess costs" provisions are fundamental to ensuring that the supplementary nature of Title I be preserved. In accordance with these provisions, Congress expects that LEAs will continue providing the same level of state and local funds that would be provided if no Title I funds were available. Title I funds are to be used to pay for the excess costs of a particular program. In no case may an LEA use Title I funds to replace such state and local funds.

In other words, LEAs may not penalize or discriminate against Title I project areas or children participating in Title I programs in the distribution of state and local funds because of the existence of Title I. These areas and children must receive their fair share of state and local funds. Title I may only be used to pay for the excess costs, i.e., the costs which are not otherwise assumed by the LEA with state and local funds. Further, Title I funds may never replace the state and local funds that would be provided but for the existence of Title I.

We have concluded that these basic principles have been set forth in the formal legal framework since 1968. We have also concluded, however, that it is difficult to comprehend the application of these basic principles to actual fact patterns without a detailed search of the formal and informal legal framework and absent sufficient time or inclination to de-code and interrelate the various statements of policy.

We found that only two of the states included in our survey had a thorough understanding of the meaning and scope of these two provisions. The level of comprehension concerning the application of these provisions varied considerably between the remaining states, although all of the states understood the basic purposes of the provisions.

It is interesting to note that one of the primary effects of this lack of understanding was not an inability to recognize that certain practices were illegal; rather an inclination to pursue overly restrictive practices not prohibited by OE.

With respect to the "supplement, not supplant" provisions set forth in the statute, we recommend that no changes be made. Further, we recommend that the regulations promulgated by OE be retained but that they be clarified, including the addition of illustrations explaining how the general principles are to be applied in specific factual situations. The clarifications would codify existing OE policies set forth in various documents constituting the informal legal framework.

With respect to the "excess costs" provisions, we recommend that the language contained in the statute be simplified. We found that several states which understood the "excess costs" concept could not comprehend the existing phraseology.

II. LEAs May Not Discriminate Against Project Area Schools in the Provision of State and Local Funds Because of the Existence of Title I

A. Introduction

This segment of the chapter will describe and analyze that aspect of the "supplement, not supplant" provision which ensures that *project areas* will *not* be *penalized* in the provision of state and local funds because they are receiving assistance under Title I. The provision also explains that under no circumstances may the LEA use Title I funds to supplant state and local funds that would be provided to *project areas* but for the existence of Title I.

In sum, the federal legal framework prohibits the LEA from penalizing project areas and furthermore, provides that in no case may Title I funds replace state and local funds.

B. The Federal Legal Framework

The existing regulation implementing this aspect of the supplanting provision (45 C.F.R. §116.17 (1974)) provides that each application for a grant under Title I:

> shall contain an assurance that the use of the grant funds *will not result in the decrease in the use for* educa-

> tionally deprived children residing in that project area of State and local funds which, in the absence of funds under Title I of the Act, would be made available for that project area... and that...the project area...will [not] otherwise be penalized in the application of state and local funds because of such a use of funds under Title I of the Act.

The key phrases in the existing regulations are that Title I funds will not result in a decrease in the use of State and local funds in any project area "which, in the absence of funds under Title I would be made available" and project areas may not be "penalized" because of the use of Title I funds.

Set forth below are two tests developed by OE for determining whether State and local funds "would be made available" to a project area and whether a project area has been "penalized". A third test is discussed infra., under the chapter entitled "ordinarily provided provision."

1. Curtailment of Services Previously Provided

The first test provides that a withdrawal of services previously provided in project areas is evidence, but not conclusive proof that there has been a reduction in the level of funds which would be provided with State and local funds, but for the existence of Title I.

Program Guide No. 45A issued on July 31, 1969 stated that "in reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of basic Title I requirements: ***(5) the applicant proposes to curtail expenditures of State and local funds for certain services and, in effect, to substitute Title I funds in order to maintain those same services in the Title I areas."

The program guide continues, explaining that such a curtailment is an indication of a violation by stating that "any applicant that insists on entering a proposal fitting the description [in 5] above must assume the burden of proof that the proposal does not involve the supplanting of State and local funds."

This standard was recently invoked in a letter from OE to one of the States included in our survey. The letter provides, in relevant part, that

> It is difficult, of course, to determine precisely the level of non-Federal funds that would be provided if Title I funds were not available. There are, however, ...basic indications of decreases in that level: (a) the withdrawal of services that have been provided at Title I schools.... The use of Title I funds to restore the services...would constitute "supplanting "

In other words, the withdrawal of a service indicates that the level of funds previously provided has been reduced by the cost of that service. However, as indicated by Program Guide No. 45A (see above), such a reduction is not conclusive proof of a violation. The LEA would have the burden of proof and could show that such a replacement has not occasioned a reduction in the level of funds or, to the extent that a reduction has occurred, it was not because of the existence of Title I funds. The application of this test is further clarified with reference to the following illustration.

Assume that in State A maintenance funds in the amount of $2,000 per teacher are made available to all school districts. The curtailment of these State and local funds for maintenance and operation by the LEA in Title I project area schools and the substitution of Title I funds would indicate that a supplanting violation has occured.

However, if the LEA could show that project area schools were to receive their fair share but the State formula had changed, occasioning a reduction for all schools, no violation would in fact have resulted. Further, it should be noted that any increased costs due to the operation of Title I programs, e.g., over time due to special Title I funded activities could be charged to Title I without resulting in a supplanting violation, since Title I may pay for the "excess costs" of a service.

2. Funds Previously Committed

A second standard for determining whether there has been a penalization or replacement of State and local funds with Title I funds covers situations where an LEA had not actually expended State and local funds in the past but has made a commitment to expend such funds.

For example, assume that the LEA had committed local funds for the construction of additional classrooms at several Title I schools. Where the school board by official action cancels encumbrances of bond funds and authorizes instead the encumbrance of Title I funds, a supplanting violation would be indicated.

A possible third test is discussed *infra*. in the chapter entitled "ordinarily provided" provision.

C. State Legal Framework

Several states included in our survey have interpreted this provision. Several of these interpretations are set forth below.

Note the relationship in most state interpretations between a reduction in the "level of funds" and a reduction in the level of an instructional service. In each case, the state interpretation would appear to be consistent with the OE policy.

> In one state, the SEA manual explains that "the district shall not use Title I funds to pay positions that have been paid from state and local funds previously."
>
> In a second state, the SEA guidelines explain that "A LEA will be in violation of the Title I regulations if it curtails expenditures of state and local funds for certain services and, in effect, substitutes Title I funds in order to maintain those same services in Title I schools."
>
> In a third state the state guidelines explain that "Title I funds being categorical in nature, are intended to supplement, not supplant other federal, state and local funds... Districts must not reduce expenditures of state and local funds and supplant those funds with Title I funds."
>
> In a fourth state, the SEA speaks in terms of a project area maintenance of effort provision. "The amount of funds expended in the project areas for service (provided with state and local funds) will be maintained at levels that are not lower than the levels that would have been maintained if no projects had been approved for those areas."

In a fifth state, the SEA has expressed the standard for judging compliance in the alternative.

> The Department shall find an LEA in compliance with the requirement against supplanting if the LEA either (1) does not use Title I funds to support a service which has been supported previously by funds from state and local sources OR (2) establishes, with respect to funds from state and local sources, that both the per pupil expenditure for instructional services (calculated on a per pupil basis) spent at the school serving its Title I project area are or will be maintained at levels at least equal to the levels which prevailed before state and local support for the service to be supported by Title I funds discontinued.

D. Policy Analysis and Recommendations

The Title I legal framework requires that LEAs continue to provide funds for basic educational services in project area schools and not to use Title I funds to supplant them. LEAs must provide the same level of state and local funds that would be provided if no Title I funds were available.

Congress expects LEAs to continue providing funds for basic educational services in project area schools and under no circumstances to use Title I funds to replace them. LEAs must provide the same level of state and local funds that "would be provided" if no Title I funds were available.

It is difficult to determine precisely the level of funds which would be provided to project area schools but for the existence of Title I. We have identified two tests developed by OE and the HEWAA. First, where services, previously provided with state and local funds, are paid for with Title I funds, a violation of the supplement not supplant provision is indicated although not conclusively proven. In such an instance the LEA must bear the burden of proof to show that a reduction in State and local funds has not occured. Second, a supplement, not supplant violation is indicated where there is a pre-existing commitment to expend state and local funds in a project area which has been cancelled and Title I funds were used in place of the state and local funds. In such a case it is the level of funds which would have been made available but for the existence of Title I which is the key, rather than the funds actually expended in the past.

Note that under each test, explanatory reference is made to an expenditure of state and local funds for services. Replacement of a particular service is a presumptive indication of a reduction in the level of funds. If in year 1 an LEA provided a reading teacher with state and local funds and in year 2 substituted Title I funds, a reduction in the level of funds would be presumed. However, the LEA is given the opportunity to prove that the state, for example, changed its allocation formula and the old level would not have been provided, regardless of whether Title I existed or not. The LEA has the burden of proof to show such replacement has not in fact resulted in a reduction in the level of state and local funds which were provided or would have been provided to a project area but for the existence of Title I.

We recommend that the existing language in the regulations be retained and that OE clearly explain in the officially promulgated regulations and in a policy manual the existence of the above-described tests. Such additions would provide clear guidance to HEW auditors, SEAs, LEAs, and parents.

A third test appearing in the existing legal framework developed by OE is commonly referred to as the "ordinarily provided" provision. Since the Legal Standards Project has concluded that the provision is a hybrid, implementing aspects of the supplement, not supplant, as well as comparability provisions, it is discussed infra, in chapter 11.

III. School Districts May Not Discriminate Against Children Participating In Programs Funded Under Title I In The Provision of State and Local Funds Because of the Existence of Title I Funds

A. Introduction

1. The Basic Title I Structure Focuses On The Child As The Intended Beneficiary

Under the Title I legal framework, it is the children, not the public or private schools, who are the intended beneficiaries. As the Eighth Circuit Court of Appeals explained in Barrera v. Wheeler, 475 F. 2d 1338, 1352 "the

Act itself makes it readily apparent that Title I appropriations are a federal grant made in trust to local school agencies for the benefit of educationally disadvantaged children."[157] This subsection of the paper will describe and analyze the aspect of the supplanting provisions which prohibits the discrimination against children participating in Title I programs in the provision of state and local funds.

2. Organization of this Section

The following organizational structure will be used--First, we will describe in general terms the content of the Federal legal framework. Second we will discuss several key issues concerning the application of the supplanting provisions which were identified during our interviews. The areas discussed include: pull-out programs, in-class programs, use of teacher aides for hall duty, cafeteria duty, etc., and receipt of high school credit for remedial courses.

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[157] The so-called "child benefit theory" was central to the passage of the initial Title I legislation. For an in depth discussion of the child-benefit theory see ESEA: The Office of Education Administers A Law by Bailey and Mosher.

Under each issue, we will describe the federal legal framework and the state legal framework. Following this discussion we will describe problems with the supplanting provisions as identified by the SEAs included in our survey, and then undertake our analysis, including the project's recommendations.

3. Overview of the Federal Legal Framework

Section 141(a)(3)(B) provides, in relevant part, that Title I funds may not be used to supplant state and local funds which would, "in the absence of such Federal Funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this title."

Since 1968, the "supplement, not supplant" regulation has provided, in relevant part, (45 C.F.R. §116.17(h)) that "neither the project area nor the educationally deprived children residing therein will otherwise be penalized in the application of state and local funds."

Early program guidelines, consistent with the Title I statute and regulations also included a statement prohibiting discrimination against children participating in Title I programs.

Section 7.1 of Program Guide No. 44 stated, in part:

> "It is expected that services provided within the district with state and local funds will be made available to all attendance areas and to all children without discrimination".

B. "Pull-Out Programs"

1. Introduction

As stated in the introduction, a significant issue respecting the Title I legal framework is whether Title I requires or encourages the design of separate remedial classes for children receiving services under Title I ("Pull-out" classes). The issue is most significant for those educators who believe in "mainstreaming," i.e., that Title I funds should be used for programs which operate within the regular classroom and not for "pull-out" programs.

Of the ten states we visited, three states strongly encouraged in-class programs, three either encouraged or required pull-out programs, and the remaining states were neutral.

It is our conclusion that the Title I legal framework neither requires nor encourages the "pull-out" design. In fact some states explain that, "the pull-out design is more prone to supplanting violations" than the "in-class" program since pull-out programs may operate simply to "replace" existing instructional activities and services, especially when the child is pulled out of his/her class for an extended period.

It appears, however, that although the Title I legal framework is neutral with respect to this aspect of the design of programs, some SEAs and LEAs expressed the point of view that the auditors encourage the pull-out design since the design may make it easier for an LEA to leave an "audit trail" enabling an auditor to "trace the Title I dollars" to the intended beneficiaries. Whether or not auditing practices have intentionally caused this result, or caused it at all, the fact remains that many persons in LEAs and SEAs shared this perception.

Whatever the cause, OE should allay the fears of those who prefer the in-class design. To ensure that Title I operates in a truly neutral fashion with respect to this aspect of program design, we recommend infra. that OE explain or develop models for "legal" in-class programs, including an explanation of what would constitute a satisfactory audit trail.

The discussion which immediately follows describes legal issues relevant to ensuring the operation of "pull-out" programs in ways consistent with the supplanting restrictions. This discussion includes an analysis of the implications of the design of the pull-out program and the length of time the child is pulled-out of his/her regular classroom assignment, and the class from which the child may be pulled.

2. The Design of a Legal Pull-Out Program

a. Introduction--In a typical school district employing a pull-out program, the special Title I funded instruction is provided during some part of the regular day, replacing the instructional or other activities scheduled for that time period. Thus, pull-out programs of this sort necessarily replace an activity paid for out of state and local funds. OE has never considered such a replacement a per se supplanting violation. The purpose of this section is to analyze OE's and the state's interpretations of when a pull-out program is illegally supplantive. This discussion will not include an analysis regarding the length of time a child is removed. This issue will be discussed later in a separate section.

b. Federal Legal Framework--The Title I statute and regulations offer no express standards for determining the legality of pull-out programs, other than the general directive in the regulations that children receiving benefits under Title I may not be penalized in the services provided with state and local funds. However, OE has, on occasion, explained its position in correspondence with particular SEAs which interpret the relevant statutory and regulatory provisions as well as Sections 4.1 and 7.1 of Program Guide No. 44.

It is apparent from the formal and informal federal legal framework that at least two legal pull-out program models can be pursued by LEAs. The first model is viewed as an extension of the regular school program and therefore, since it does not replace the level of funds supporting that program, the contribution of additional state and local funds is not required. Under the second model, the LEA designs a distinct program which for all intents and purposes replaces the child's regular instruction, thereby replacing the level of funds which would be provided but for the existence of Title I. Under this model an LEA must continue to contribute its fair share in support of the child's instruction, i.e., the amount of state and local funds normally accruing to each student. Title I may then pay for all remaining excess costs.

The first model is described more fully in correspondence with SEAs. In one letter written to an SEA not included in our survey, OE explained that an acceptable pull-out program design "should be conducted in such a way as to be supplementary to and coordinated with instructional programs being provided for Title I children in their regular classroom" Under this program design model the regular classroom teacher retains ultimate responsibility and control over the the child's progress. The Title I paid teacher is responsible for meeting the child's special needs, the regular classroom teacher retains the responsibility of providing for the child's general needs.

Under the circumstances described above, it is obvious that the regular classroom from which the child was "pulled", will enjoy a reduced pupil to teacher ratio. A second letter written by OE explains that "the incidental effect of reducing class size [i.e., the size of the class from which the child is "pulled"] may be approved, provided that the instructional program is definitely tailored to meet certain special needs of targeted children. Title I funds are to be used for the expansion and improvement of the regular school program and not for the replacement or supplanting of state and local funds in support of that program."

Set forth below is an example of a LEA program design which did not expand and improve the regular program, but rather replaced the children's regular instruction. The example was contained in an OE Review Team Report.

> the method of scheduling, the class size, the similarity of the Title I program to the regular program, the inconsistencies in selection of children, and the giving of the reading grade by the Title I teacher leads the team to conclude that the Title I reading and/or math was not supplemental and was merely used to reduce class size.

In sum, if a so-called "pull-out" program contributes to meeting the needs of the participating children (a) by providing a supplementary program, i.e., one which expands and improves the regular school program which is (b) coordinated with the regular classroom teacher, who retains ultimate responsibility and control over the child's progress, a supplanting violation has not occured, even if the class from which the child has been pulled has a reduced pupil to teacher ratio. If these conditions are met the LEA need not contribute any of its own funds to the operation of the pull-out program. To the extent these conditions are not satisfied, the LEA will be considered to have violated the supplement, not supplant provision unless it contributes state and local funds to support that portion of the instructional program which would have been paid for from state and local funds but for the existence of Title I. The alternative of contributing state and local funds is described below. We refer to this alternative as type 2 design.

A second pull-out program design is also acceptable under the existing federal legal framework. Under this model the LEA may totally restructure a child's educational experience, either with respect to one curricular area or with respect to the participating child's total educational experience, by the provision of a distinct, non-coordinated program, so long as the LEA continues to contribute the level of funds that would have been provided from state and local sources but for the existence of Title I.

Since as early as 1968, OE has consistently explained that such a distinct program designed to meet the participating child's special educational needs is permissible under specified circumstances. Today this concept is explained with reference to the excess cost provision.

Section 4.1 of Program Guide No. 44 indicated that OE wanted to encourage LEAs to totally restructure the curriculum for the participating children.

> Probably the most obvious indication of a child's need for special educational assistance under Title I is his inability to respond constructively to the regular school program. In many cases

> this program can be modified and integrated with the *services* to be provided under Title I so as to provide the child with a *total program* adapted to his special needs. *In this connection*, the requirement that *applicants maintain regular school programs in the project areas at the same levels as they would have been maintained if Title I funds were not available* applies only to *expenditures* and *not* to the *program* itself.

Consistent with this program guide, OE has recently explained in correspondence with an SEA that to the extent the LEA chooses this option:

> It would be appropriate, therefore, and indeed required that State and locally funded staff be provided for any group of children in remedial classes in the same proportion as for the same number of other children.

The letter continues by including the following example:

> Thus, if one teacher with four teaching periods is normally provided for 100 children then the equivalent of one State and locally funded teacher should be provided for 100 children enrolled in remedial classes for children

> designated to receive assistance under Title I... Our recommendation then...is that once a carefully designated compensatory education program in mathematics has been established [in lieu of the child-children's regular math], a normal input of State and locally funded resources should be provided commensurate with the number of children involved .

Recently an SEA asked OE whether comparability requirements would be violated if 5th grade pupils eligible for services under Title I may be taught exclusively by a Title I paid remedial math teachers. The Commissioner explained that

> In the illustration provided, such a procedure would not violate the comparability requirement, but would appear to violate the supplement, not supplant requirement of the statute. Thus, the 20 fifth graders in need of remedial mathematics are entitled to instructional services provided with state and local funds.

In short, the participating children are entitled to their fair share of state and local funds. Thus, applying this standard to the OE Review Team Report finding described supra., the mere facts that the LEA designed a pull-out program which was similar to the regular classroom program and the pull-out teacher gave the children their grades, does not mean that a per se violation of the supplement, not supplant provision has occured. The critical question is whether the LEA expended on the children participating in the pull-out program the amount of state and local money normally accruing to these children?

In the situation described supra, the LEA did not contribute the amount normally accruing. In sum, the OE Review Team found that a supplanting violation had occured because Title I funds were being used to provide instructional services that were being provided to other children with state and local funds. Recall that Title I funds may only be used to pay for the excess costs of programs.

To summarize, there are two basic types of pull-out program designs which an LEA can develop consistent with OE interpretations of the supplement, not supplant and excess costs provisions.

> (1) The LEA can design a supplementary program or project in which the regular classroom teacher retains ultimate and complete responsibility and control with respect to the educationally deprived child's school education, including the subject area in which the child is receiving special Title I assistance. There is continuous coordination between the regular classroom teacher and instructional staff person paid for out of Title I funds. This type of design can take place either in the regular classroom (in-class) or in a separate classroom (pull-out). The only difference between in-class or pull-out is the physical location of the children (type #1 design).
>
> (2) In the second type of program design, Title I funds are used to totally redesign or restructure a participating child's educational program. This type of program design may involve one subject area OR the child's entire school program. The regular classroom teacher is totally relieved of all responsibilities and control with respect to the child's education. This is called a "distinct program" in which the child receives his/her instruction in a separate classroom. It is not a pull-out program as the term is traditionally used, because the child is neither returned to the regular class nor instructed by the regular classroom teacher (type #2 design).

Under the first type of design, where there is (a) coordination between the regular classroom teacher and the teacher paid for with Title I funds and (b) control is retained by the regular classroom teacher, the standard for determining whether the LEA has discriminated against children receiving Title I benefits is whether the program paid for with Title I funds is supplementary, i.e., does it expand and improve the child's instruction received in the regular classrom and is it over and above that which is provided to children not receiving benefits under Title I. This standard is expressed in the first OE letter quoted above. If these conditions are met, the LEA need not contribute any of its own funds to the operation of the program.

With respect to the second type of program design, i.e., a "distinct program," the standard is whether the distinct program receives from state and local funds contributions commensurate with the level of support that would be provided to such children if they had remained in the regular classroom. This standard is set forth in Program Guide No. 44, Section 4.1 and the second OE letter quoted above interpreting the present excess cost concept.

Armed with an understanding that OE has developed at least two legal pull-out program designs, we will now describe the various state interpretations of the supplement, not supplant and excess costs provisions.

c. State Legal Framework--The states included in our study have developed varying policies regarding the meaning of the "supplement, not supplant" provisions as applied to pull-out programs. Two of the states included in our survey developed policies, based primarily on their reading of Program

Guide No. 44, Sections 4.1 and 7.1 which directly parallel the two models described *supra*. developed by OE. Set forth below is a description of these state models as well as the policies pursued by other states.

In one state, the SEA included in the instructions accompanying the LEA Title I application various legal non-supplantive program designs, including model pull-out programs.

The instructions set forth four pull-out models, three of which are variations of the type No. 1 design developed by OE (see *supra*.). The state pull-out design models provide: [158]

- "Students are served during part (50% or less) of their regular mathematics, language arts or reading instructional period."
- "Students are served for a full instructional period. The Title I instruction replaces an elective class and is, therefore, provided in addition to the Title I students' regular instruction in reading, mathematics or language arts."
- "Students are served for a full instructional period. Students move from their regular schedule into an *intensified* instructional center where they are treated individually, then returned to their regular schedule. The design as

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[158] It should be noted that the state policy concerning the classes from which a child may be pulled are more exact than the federal policy (see *infra*.).

> to what class they come from for their treatment is made jointly by the regular classroom teacher(s), the specialist, and where appropriate, the counselor. This decision, where appropriate is made in consultation with the parent. Some schedules are rotated so that the student does not miss the same class constantly. Others are scheduled into the center during their reading, math, or language arts period, but the goal for all participants is to return them to the regular schedule as soon as it is determined that they can succeed in that setting. There is continuous interfacing between the center staff and the regular classroom teachers regarding the progress and treatment of each student, so that the regular classroom teacher continues to be responsible for the student's academic progress."

As explained supra., this state has also developed a model which it refers to as the "excess costs" model which is similar to the type No. 2 design developed by OE:

> Students are served for a full instructional period. The Title I instruction replaces reading, mathematics or language arts classes provided by the school district. Only the excess costs of this instructional design may be charged to Title I. Should the district elect this model, it must set forth the method used to determine excess costs in the addendum.

In a letter to an LEA, the Title I Director of this SEA explained precisely how the so-called "excess costs" model would operate. Apparently the LEA designed a program in which educationally disadvantaged students would receive all of their English, mathematics and reading instruction in Title I classes.

The SEA Title I Director explained that "in order to comply with Title I regulations as they were interpreted to me by United States Office of Education officials... the district must provide instructional resources for project participants to the same extent it does for regular students."

In determining the excess cost of the Title I component, the district must:

(1) Determine the number of Re-Entry reading, mathematics, and English sections required to accommodate participants by applying the formula A/B X C = S where:

A = Number of students
B = Average Section Size
C = The number of meetings per week.

You can also determine the number of sections required by simply counting them. Assuming A=42, B=7, and C=3, 42/7 X 3 = 18. Therefore, it requires 18 sections of reading, mathematics and English to accommodate 42 Re-Entry students.

(2) Determine the number of regular high school reading, mathematics, and English sections required to accommodate participants.

42/21 (assumed average section size)
X 3 = 6

(3) Determine the number of full time (FTE) teachers required to teach the Re-Entry sections.

$$\frac{18 \text{ Re-Entry Sections}}{25 \text{ Sections taught by 1.0 FTE}} = .72$$

(4) Determine the number of full time (FTE) teachers required to teach 6 regular high school sections. In this hypothetical case, the actual personnel costs of the Re-Entry reading, mathematics, and English sections is .72 (FTE. [District Contribution Proportion = $\frac{\text{Regular sections}}{\text{Title I sections}} = \frac{6}{18} = 1/3$. Therefore the District must pay $\frac{1}{3}$ of the cost of the Re-Entry sections OR .72 FTE X $\frac{1}{3} = .24$]

The District's contribution would be .24 FTE and Title I would cover the excess cost which is .48 FTE (.72 - 24).

In a second state, the SEA issued a policy statement explaining the standards for determining the legality of a pull-out program. Again, two models were developed, paralleling the OE models.

Under the first pull-out model, the classroom teacher, paid from state and local funds, retains ultimate responsibility for the education program of each participant in the Title I program." The Title I teacher is available solely to assist the regular teacher in working with educationally deprived children who meet the district's criteria for participation in the Title I program". Thus, the SEA explained that the term "pull-out" program is really a misnomer for describing this type of a program. The children remain in the regular classroom under the supervision and responsibility of the regular classroom teacher in every sense except the child's physical location for one or two periods a day.

To assure that the classroom teacher retains responsibility, the SEAs' position is that "in order to have the necessary planning, implementation, and evaluation of a child's progress between teachers, the child must come from the English class (if reading is being remediated) and the necessary coordination must be between the child's English teacher and the Title I lab-teacher.[159]

To assure the necessary coordination, the SEA has on various occasions required that the LEA establish written procedures describing the coordination process as part of the project application. One such procedure is set forth below.

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[159] It should be noted that the state policy is more exacting than the federal policy, with respect to the class from which a child may be pulled (see infra.).

PROCEDURE OF COORDINATION BETWEEN REGULAR CLASSROOM TEACHERS AND COMPENSATORY EDUCATION TEACHERS

For the remainder of this year the major method of coordination will consist of two related forms: structured meetings or conferences and informal meetings. The function of each is outlined below.

1. Structured Meetings

   Regular classroom teachers, who are paid from local funds, will meet one day of every fourth week with the compensatory education teachers, who are paid from Title I funds.

   At this meeting--or series of meetings during the fourth week--the progress of the identified educationally deprived student will be evaluated and plans made for implementing the program to meet special reading or math needs of the student for the next four weeks.

   One instrument indispensable to the conference and one to be studied and used in planning will be each student's up-to-date tracking card for Individually Paced Instruction (IPI) in reading or math. These cards provide a record of each student's progress (pre and post test data) and provide information concerning basic skills the student has learned or must learn. This information will form the basis for the individual education plan.

   Since ESEA Title I teacher aides are involved in the instruction of the students and in the record keeping, they will participate in the meetings when the teachers believe they may contribute and their attendance is applicable to the matter in hand.

> A coordination conference form (copy attached) will be used to document action and follow-up on each student.
>
> 2. Informal Meetings
>
> The above teachers will meet informally to discuss problems, progress and the educational plan of individual students as often as necessary.
>
> One anticipated outgrowth of these meetings, aside from student-related benefits, is the involvement of more, and perhaps complex, techniques of collaboration which teachers will employ jointly in helping educationally disadvantaged students reach their highest potential.

The state's policy paper contains a second pull-out model, which is similar to the OE "type No. 2 model" described above. Under this model, the child is not only physically but in all respects pulled-out from the regular class. The teacher in the second class is responsible for structuring a self-contained instructional unit.

The SEA's policy statement explains:

> Another potential alternative for avoiding supplanting in the use of Title I funds for educationally deprived children, who meet the district-wide criteria for project participation, is the structuring of a self-contained instructional unit. In this setting, the State and local funds generated by the participating children for instructional services must be committed to an instructional program to meet their special educational needs. Title I funds then can be used to

> make up the difference between the local and state resources available and the resources needed for making an impact on the special educational needs of the most educationally disadvantaged who qualify for participation in a Title I project.

Most of the other states included in our survey did not pursue policies which were consistent with OE's policy set forth in Section 4.1 of Program Guide No. 44 and the current excess costs provision included in the Title I statute.

In one state, the SEA, has adopted the so-called "positive-benefit" standard for all pull-out programs, based primarily on one condition prescribed by OE regarding full-day pull-out programs (see infra.)

> Any negative effects of the temporary isolation of the children in the pull-out classes must be outweighed by the positive effects that have been shown as a result of participation in the program.

Under this standard, the Title I Director explained that since a child who is in the lowest quartile would not be benefitting from regular classroom instruction, a program which was specifically designed to meet his/her educational needs would not be supplantive.

It would appear that the positive-benefit theory as described above is inconsistent with OE policy as indicated by an OE Review Team Report of this state explain that "in the three school districts, the Title I reading classes and regular reading classes were conducted simultaneously and for the same length of time for children assigned to a particular classroom. Approximately 1/3 to 1/2 of each class was participating in Title I reading. The materials were similar in both classes."

In short, it would appear that although the positive effect or benefit of pull-out may be a factor in determining the legality of a pull-out program, it is not, by itself, determinative. In such a situation, the LEA would be required under a type one design to ensure coordination between the teacher paid out of Title I funds and the regular classroom teacher (type 1 design), and would be required under a type two design to expend an appropriate amount of state and local funds for the "distinct" program.

In another state the SEA explained that it would not allow an LEA to pursue an "excess cost" model. A LEA program would satisfy the "supplement, not supplant" requirement only if the pull-out program offered a longer period of instruction e.g. 75 minutes of reading v. 45 minutes the child would have received in the regular classroom.

3. Determining the Class From Which The Child Is Pulled

a. Federal Legal Framework--The formal legal framework does not make express reference to when and from which class a child may be pulled to receive "supplementary" services. However, OE has set forth its policy in correspondence to SEAs. One such letter explains:

> It is our intention not to limit unduly the options of local educational agencies with respect to the timing and the approaches to be taken in the development of special Title I instructional activities to be conducted outside the regular classroom. We would suggest therefore, that your office avoid recommending that students be '...served in a resources room during their regular mathematics, language arts, or reading instructional period.' The timing of Title I pull-out programs should be based on educational considerations as well as the practical constraints on the local school system.

b. State Legal Framework--In each of the states included in our survey, we asked the SEA Title I Director whether it made any difference, for purposes of complying with the supplanting provisions whether a child was pulled out from (a) the class he/she was receiving remediation in, from (b) a class other than the class in which remediation is being received, (c) a non-instructional class, or (d) any class.

The responses varied considerably from state to state. It would appear that in each case, the state response goes beyond the federal interpretation described above.

In one state, the SEA requires that a child be scheduled out of the subject area class in which he/she is receiving remediation on the theory that optimum coordination may occur under this set-up.

In a second state the SEA explained that scheduling a child out of the subject area class in which he/she is receiving remediation would be "pure supplanting." The SEA suggests that the class from which the child is pulled be rotated so that the child doesn't fall too far behind in any one area. The SEA also suggests that the child be pulled from a non-instructional class so that the child can receive a "double dose" of instruction in the subject area being remediated.

In a third state, the SEA Title I Director explained that "Title I is about individualizing instruction." The Title I Director questioned whether the supplanting provisions required the provision of a "double dose" of instruction in order to be supplementary. He concluded that they do not but that the supplanting provisions required a different kind and quality of service. For example, the Title I Director would allow a pull-out program which had a pupil-to-teacher ratio of 5 to 1 instead of a normal 25 to 1 ratio even if the pupil-to-teacher ratio in the regular classroom were reduced to 20 to 1 and the same curriculum were used.

4. The Significance of the Amount of Time A Child Is Pulled Out Of Regular Class

a. Introduction--As stated previously, a pull-out program operating during the school year and during regular school hours is necessarily supplantive because for the precise time period of the pull-out the Title I program must replace some other activity financed with state and local funds. The question remains under what circumstance is such a pull-out program illegally supplantive. The previous segment of the paper discussed this issue by focusing on certain aspect of the program's design. This segment of the paper will focus primarily on the question of whether and when the amount of time a child is pulled-out of his/her regular classroom assignment affects the legal status of the program or project.

To date, the only specific guidance from OE that the Legal Standards Project has discovered is in correspondence. One letter concerns the situation in which the eligible child is pulled-out of his/her regular class for the entire day and a second letter concerns the situation in which the child is pulled-out for more than one-half day. Several states in our survey have developed policies concerning the legal significance of a less than full-time pull-out program.

It is interesting to note that the state policies were generally consistent with the federal policy, although unlike the federal policy which relates to the ability to provide for a coordinated program, the state policies did not contain a rationale. The OE and SEA interpretations are set forth below.

b. One-Half Day Pull-Out--In the spring of 1975, an SEA not included in our survey presented the following question to OE.

> Would the U.S. Office of Education be in agreement with a plan where children receiving Title I services could be removed from the state supported school program for no more than one-half the legal school day and such practice would keep the LEA in compliance with the Federal law and regulations?

OE explained that a program in which a child is pulled-out of his/her class for less than one-half day will be considered legal if (a) there is coordination between the Title I paid teacher and the regular classroom teacher and (b) the latter retains control over the child's educational progress in that subject area. This is consistent with the policy governing type #1 programs. (see *supra*.)

If a program is for one-half day or greater, OE said that sufficient coordination and control is not possible and therefore "a consideration of the excess costs concept...has led us...to the conclusion that State and locally funded staff and related instructional services should be provided for such a program. The number of State and locally funded staff provided for a one-half day (or longer) Title I program should be commensurate with the number of children involved...". This is consistent with the policy governing a type No. 2 program. (see _supra_.)

In one state, the SEA has issued a general policy statement entitled "Ground Rules for ESEA Title I Pull-Out Programs Funded Under Title I." The policy statement provides, among other things, that "whenever a student is pulled out of regular classes for _extended periods of time_, regulations do not permit withdrawal of local-state fiscal support... The SEA has defined the phrase "extended periods of time" consistent with the federal policy to mean pull-out programs in which the student is out of the regular classroom half-time or more.

Specifically, the state policy provides in this situation, that:

> "Personnel and all other resources provided children enrolled in regular classrooms...[must]...also [be] provided to children participating in a Title I program. The School District must be able to demonstrate that an equitable portion of local/state resources are provided to the participating Title I children."

The policy statement then explains two different ways in which an LEA could satisfy the above requirement:

> "1. The average pupil-teacher ratio in the district's elementary school is 26-1. In the transition room the ratio is 13-1. The district should support the teacher's salary in the same ratio or 50% of the salary. In addition, each child is entitled to supplies materials, and textbooks in the same proportion as the regular school program. Title I can purchase supplementary materials that are above and beyond the basic program cost.
>
> 2. The SEA has a record of the instructional costs at the elementary and senior high school levels for each district in the state. If the elementary instructional costs in a district are $600 per child and there are ten children in a transition room, the district must demonstrate that $6,000 of local funds are going into the instructional program for these children."

c. Two-Hour Pull-Out-- In at least two states the SEAS have determined that a pull-out program operating for two or more hours per day and which is funded entirely with Title I funds will be illegally supplantive, regardless of the degree of coordination between the regular classroom teacher and the remedial teacher. In these states, if the pull-out program is for less than two hours a day and the child is receiving the basic education to which he/she is entitled in the regular school program, such classes will not be considered to be illegally supplantive.

d. Full-Day Pull-Out Programs--In 1974 OE developed criteria for determining whether a fullday pull-out program is illegally supplantive. This OE policy was not set forth in federal regulations or guidelines. It appeared in letters written to at least two states. Set forth below are the standards contained in the OE letter as well as state interpretations of these standards.

(a) All requirements concerning comparability have been met.

(b) Programs are substantially different in quality and content from services offered children in regular classrooms and are designed to meet specific needs of the children to be served.

(c) As noted above, personnel and all other resources provided children enrolled in regular classrooms are also provided to children who are participating in a Title I program. If, for example, a classroom teacher is assigned to 25 pupils in a regular school program, a similar ratio should exist for children participating in a Title I program. It is only after the basic educational services have been provided with State and local funds uniformly throughout the school district that supplementary services funded under Title I should be provided to eligible children.

(d) Any negative effects of the temporary isolation of the children in the pull-out classes must be outweighed by the positive effects that have been shown as the result of participation in the program.

In a number of states all-day pull-out programs are permitted if they meet the standards set forth above.

Several states have developed official policies which either prohibit or strongly discourage the use of full-time pull-out programs. The rationale behind these policies is that children participating in Title I programs should not be completely isolated from the mainstream of the school population. These states place great weight on Section 5.5 of Program Guide No. 44, issued by OE, which states, in part, that "any proposed Title I activities which, because of location or for other reasons, would in effect prolong the racial, social, or linguistic isolation of the children to be served would be self-defeating and should not be approved."

C. In-Class Programs

1. Introduction

Consistent with the educational philosophy of "mainstreaming" that all children should remain in the regular classroom whenever possible, several states encourage the design of in-class programs.

The allegation has been made that the administration of Title I by HEW, especially the HEW Audit Agency encourages pull-out designs because under the pull-out design it is easier to trace the Title I dollars to the child. Furthermore, it is contended that OE encourages such pull-out programs as evidenced by the fact that all six exemplary programs disseminated by OE utilize the pull-out design.

As stated elsewhere, we have concluded that the Title I legal framework permits both pull-out and in-class programs. In the absence of specific direction from OE, however, it is understandable why some LEAs fearing audit exceptions steer clear of in-class programs. Most of these fears concern general aid rather than supplanting questions. These questions will be discussed elsewhere. A supplanting issue might arise though, if for example, a teacher's aide is given total responsibility for the targeted children's instruction in a particular subject area while the regular classroom teacher instructs the non-targeted children.

2. Federal Legal Framework

OE, in correspondence to SEAs, has explained the parameters of a legal in-class program. One letter concerns the use of Title I aides in the regular classroom. The letter explains that an aide paid for totally with Title I funds may be used "in order to free the teacher to perform Title I functions" the letter then adds:

> However, it is important to note that the mere assignment of a teacher aide to a regular classroom teacher does not constitute a Title I program. The teacher aide must be a part of a more comprehensive program particularly designed to meet the special educational needs of educationally deprived children.

Further, OE explains the role and responsibility of the regular classroom teacher.

> Any supervising teacher assigned a Title I aide must know and be accountable for the contribution the aide is supposed to make to the realization of the objectives of the Title I program.

3. State Legal Framework

In reviewing state materials, it was evident that there exists very little relevant information pertaining to in-class programs. However, one state has formulated a description of a legal in-class program.

The SEA application forms for 1976-1977 school year explains:

> Classroom: Participants are served in the regular classroom setting by certified, non-certified persons or by tutors, during reading, mathematics or language arts periods.

A second description of this model also was explained in a letter to an LEA Superintendent:

> Classroom aides--aides are trained to assist eligible Title I students under the direction of the regular classroom teacher. Assistance is provided in reading, mathematics or language arts only. This model applies supplemental resources for the instruction of Title I students.

The other states in our survey explained that if a teacher aide paid with Title I funds is scheduled to work with the regular classroom teacher, the aide either (a) must work only with Title I children, (three states) or (b) may work for Title I children by "freeing up" time for the teacher so that the teacher can spend additional time working with the Title I children (three states). (See *infra*. for a more general discussion with respect to the use of teacher aides under "general aid.")

D. Use of Teachers and Teacher's Aides for Hall Duty, Cafeteria Duty, Etc.

A difficult question has arisen regarding the meaning of the supplanting provisions as they relate to the use of personnel paid out of Title I funds for hall, yard or cafeteria duty. OE, in a letter to a state included in our survey, explained that:

> These duties have always been performed in Title I and non-Title I schools by personnel who are paid from state and local funds and hence, the use of full-time Title I personnel, for this purpose would not be supplementary.
>
> If such duties must be performed by Title I as well as other personnel in order to meet the terms of their employment then the time involved must be compensated for with state and local funds... .

Several of the states included in our survey have been faced with difficult policy issues regarding this issue.

For a more detailed discussion concerning the use of teacher aides see infra. under "general aid".

E. The High School Credit Issue

1. Introduction

In the course of our interviews, we asked the SEA Title I Director in each state whether and under what circumstances the LEA could offer high school credit to a student enrolled in a remedial class paid for with Title I funds. Set forth below is the federal legal framework and the various state interpretations.

2. Federal Legal Framework

OE maintains that the relevant issue is not credit v. no-credit but whether or not the LEA is providing a type #2 program design (see supra.):

> "Another way of assuring the maintenance of the level of State and local funding for children in the Title I program is for the applicant to provide State and locally funded instructional resources directly to the Title I program on a basis that is commensurate with the number of children participating in that program. The latter approach must be followed if the Title I program provides the participating children with all of their instruction in a particular curriculum area (type #2 program design) whether or not they receive academic credit for such instruction.

> ...the applicant (must) provide state and locally funded instructional staff and related instructional resources directly to the Title I program on a basis that is commensurate with the number of children participating in that program...
>
> In such a program, Title I funds are used to pay only the costs of the program that are in excess of the cost of the 'normal input' and local staff and other instructional resources.

3. State Legal Framework

The state to which this response was addressed was included in our survey. The SEA Title I Director, in the course of explaining the state's interpretation with respect to this issue stated that "when I received this letter I read it once, then a second and third time. I could not understand what OE was saying. Thinking there might be something wrong with me I gave it to my assistant. He could not understand it either. Thus, I developed what I considered to be a reasonable interpretation."

Not being familiar with the relationship between excess costs and supplanting provisions, the SEA misinterpreted the letter and concluded that credit could be given when Title I paid for elective but not required courses.[160] If this letter had been sent to the SEAs more thoroughly versed in Title I, the interpretation would have been different since the models developed by those SEA's came to the same conclusion as OE concerning the relationship between the supplanting and excess costs provisions. In fact, one well-versed SEA actually explained to an LEA that the issue is not whether credit may be given; rather whether the LEA is contributing sufficient resources to the educational program of those children also receiving assistance under Title I.

> As presently implemented, the Title I math program is supplanting local and state effort since the eligible Title I children are receiving their math instruction from Mr. James and are receiving credit toward graduation and/or promotion for the Title I work completed.
>
> This is contrary, in our opinion, to the "over and above" philosophy of the Title I legislation, regulations and guidelines. This view is based on the fact that every student earns instructional time and support services from local and state fund sources which may not be omitted because a child qualifies for participation in the Title I project.

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[160] It should be noted that when the SEA Title I Director handed us the letter and asked us for our interpretations, we were unable to be of any assistance. It was not until six months later, after a thorough examination of past guidelines, regulations, legislative history and review of a number of relevant OE letters that we were able to comprehend its significance.

In several of the other states included in our survey, SEA's categorically prohibited the giving of credits to children enrolled in Programs paid for with Title I funds. For example, an SEA monitoring letter explained, "the philosophy of Title I as supplementary precludes the giving of credit to students while enrolled in a Title I supplemental program."

In other states, the SEA explained that credit could be given to the children attending such classes.

F. Problems With The Intra-School Supplanting Concept

In the course of our interviews in the ten states, strong disagreement was expressed by a few SEAs regarding the concept that Title I dollars must be traced beyond the project area school. Some of the key problems identified are set forth below. The Project's discussion of these issues are presented in the next section.

First, it was explained that the overall structure of Title I in general, and the intra-school supplanting provisions in particular, focuses on the child as being deprived and to blame for his lack of success in school, rather than focusing on the failure of the school to offer an environment capable of meeting each child's unique needs.

Second, several SEAs expressed the opinion that the present Title I structure, requiring the tracing of dollars to participating children, has "the effect of stigmatizing the children in Title I programs as "dummies", especially where the children are pulled-out from their regular classroom."

Third, the state explained that the intra-school supplanting provisions require an identified program defined by what is not happening to others, i.e., comparisons of services offered to Title I children with a base program. HEW auditors trace Title I dollars, rather than determine whether the special needs of educationally deprived children are being met. This orientation ignores program quality; it also encourages pull-out designs.

Fourth, since Title I often acts as a catalyst to change the base program, it is hard to distinguish the base from the Title I program.

G. Policy Analysis and Recommendations

1. Introduction

The discussion above highlights the central issues concerning the intra-school supplanting prohibition. This segment of the paper will address the conceptual problems identified in the course of our interviews and then describe and explain our conclusions and recommendations.

2. Conceptual Problems With Intra-School Supplanting Provisions

a. Introduction--In the course of interviews, three basic problems were identified with respect to the Title I conceptual framework, especially the intra-school supplanting aspect of the legislation.[161] Set forth below is an analysis of these problems as identified by the SEAs.

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[161] For a discussion of the special problems identified by the SEAs included in our survey with respect to the interaction between Title I and state compensatory education programs, see our paper entitled, A Description and Analysis of the Relationship Between Title I ESEA and Selected State Compensatory Education Programs.

b. Title I Blames the Child for His/Her Failures In School, Rather Than the School--We found no basis for the assertion that the Title I framework blames the child. In passing Title I Congress recognized that many school districts throughout the country were failing to meet the special needs of educationally deprived children. In addition to perceiving these respective failures, it recognized one basic reason for this neglect, i.e., lack of sufficient financial resources to pay for the services that would have to be provided. The Congressional Declaration of Policy begins (Section 101 of Title I):

> "In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance..."

Educational deprivation is a condition. Read within the context of the Congressional intent, the term is simply a shorthand for describing the intended beneficiaries of the financial resources provided under Title I. The purpose of the term is not to blame children for needing special assistance to catch up to their grade level. It is to identify those who need help most.

Title I is intended to change the school environment for a specific group of children. Congress concluded that it was necessary to limit the scope of the program in part because of the limited Federal funds available. Only the educationally deprived students in a school, not the whole school population, are the beneficiaries of Title I. This is to prevent the dilution of funds to the point where they have little effect.

Of course, in those schools which have a large percentage of educationally deprived children (80-90%) the administrative realities may dictate a modified approach. We will take this matter up later under our discussion of the general aid prohibition.

In addition to the conceptual reason for employing the term "educationally deprived children" and focusing the federal funds on changing the environment of the school as it relates to them, there is a second more practical reason for the basic focus of the Act on assisting children rather than particular institutions. This reason is explained in terms of the so-called "child-benefit" theory of Title I.

c. The Title I Legal Structure Has The Effect Of Stigmatizing Children Participating In Title I Programs As "Dummies", Especially Where The Children Are Pulled-Out From Their Regular Classroom--Several SEAs included in our survey expressed the point of view that the focus of Title I on the child as the intended beneficiary and the resultant necessity of tracing dollars down to the child level has the tendency of stigmatizing children participating in Title I programs as "dummies" especially where the child is pulled-out from his/her regular calssroom

It is beyond the scope of the project's expertise to comment on the question of whether Title I in general or "pull-out" designs in particular have the effect of stigmatizing children participating in Title I programs and, assuming the existence of such an effect, its significance.

However, we did find that in general those persons who felt that the "stigmatization" issue was significant also were of the opinion that Title I should be amended to provide general aid to schools or school systems. On the other hand, those persons who felt that the stigmatizing effect of Title I was outweighed by its positive benefits of focusing additional dollars on educationally deprived children who might not otherwise receive special assistance were of the opinion that the present structure of Title I as a categorical aid program should be preserved.

We have already described the basic allegations respecting the stigmatizing effect of Title I on children. Set forth below are some reactions expressed to us by those who disagreed with this contention or who felt that the positive benefits clearly outweighed any negative effects.

One SEA Title I Director explained, "the issue of whether Title I stigmatizes children as 'dummies', is not a problem with the Title I program, but with the teachers. To the extent a child feels stigmatized, it is usually because the teacher makes the child feel like a dummy." As Eliza Doolittle observes in Pygmalion, "the difference between a lady and a flower girl is not how she behaves, but how she's treated."

Another Title I Director explained that "the degree to which a child feels like a dummy has nothing to do with participation in the Title I program, whether the child receives assistance in the classroom or whether he/she is pulled-out. The other students just know who is smart and who isn't." This Title I Director also raised the following question: "What's a greater stigma for a child,receiving special assistance a few periods a day so that it may be possible to read at the same level as ones peers, or not being able to read at all?"

A third Title I Director explained, "in the early days the issue of stigmatization arose because children were being labelled, but were not receiving any additional services. Today, LEAs are focusing additional services on the educationally deprived child and parents of other children are storming the doors demanding that their children receive the extra services. The stigma thing is not an issue anymore because of the positive benefit of receiving extra services and more intensive instruction."

A fourth SEA Title I Director explained that "children are constantly being pulled-out of classes for numerous reasons. Other children often look at children in Title I programs as the kids with all the extra fun materials, not as the 'dummies' ".

d. The SEA Contends That Title I Requires An Identified Program For Educationally Deprived Children Defined In Terms Of What Is Not Provided To Others - The Federal Government Is Concerned With Tracing Title I Dollars And Not With The Quality Of The Educational Offerings--Generally speaking, Title I does require an identified program for educationally deprived children defined in terms of what is not provided to non-Title I recipients. Such an approach is one way of assuring that Title I funds are being used for the "special" needs of educationally deprived children and are not used to reduce the LEA's overall fiscal responsibilities.

However, as we have pointed out supra an identified program does not mean e.g. a pull-out program or a program after school. It may be an in-class program or a program which totally restructures a child's entire learning experience. In the latter case, the standard measure for determining whether supplanting has occurred is not whether the LEA has maintained its regular school program for such children but rather whether the level of expenditures with state and local funds has - been maintained.

We disagree with the contention that the federal government's only concern is with "tracing federal dollars" and not with the question of whether the LEA has designed and is implementing a quality program. By requiring an identified program, the federal government is able to determine whether the LEA's program is implemented pursuant to the project application, consistent with minimum standards contained in the statute and regulations. The phrase "trace the dollars" is often used in a derogatory fashion to describe this concern. We are of the opinion that accountability standards must be included for any program having particular goals, objectives and a specified group of intended beneficiaries. Title I is no exception.

Government auditing enforces only minimum standards prescribing which areas may receive financial assistance, which children may recieve the benefits under Title I and which needs may be met by programs and projects under Title I. The "tracing of dollars" to ensure that these objectives have been met is not restrictive. It is the states in accordance with their oversight responsibilities which must determine that the substantive design of programs is of sufficient quality to provide the promise of success.

e. Title I Is Often A Catalyst For Changing The Base Program; Therefore It Is Difficult To Distinguish The Base From The Special Program--It Encourages A Pull-Out Design--Program Guides 44 and 48 specifically urge LEAs to change their base programs. Change is not the same as disappearance. The change from one base to another can and must be a conscious process. LEAs are in the best position to distinguish their base programs from their Title I programs. They have the power to to define their base programs in recognizable ways and to change them in recognizable ways. Common sense, Title I aside, demands that this power be wielded rationally.

It is reasonable that federal dollars should not pay for services which should be paid for with state and local funds. To implement this concept, LEAs must be able to identify the components of their own programs.

With respect to the question whether Title I encourages a pull-out design, we have explained supra., that the Title I legal framework does not require the design of "pull-out" programs. The legal framework is silent in this regard. Several SEAs explained that many LEAs in their state are pursuing the pull-out design because they have found that it is the best design ensuring that the children receive the most intensive instruction necessary to bring about improvement in the children's educational attainment.

However, SEAs also explained that it may be the case that certain LEAs fearing audit exceptions or not being aware of acceptable alternatives, pursue the pull-out design because it is the safest course of conduct. Since only educationally deprived children are "pulled-out", it may be easier to ensure that only these children receive the benefits of Title I. It was beyond the scope of our NIE mandate to determine the accuracy of the latter contentions i.e., that LEAs are pursuing pull-out programs because it is easier to prove compliance rather than because the LEAs educational philosophy dictates such a design. Other NIE studies may shed some light on this issue.

Furthermore, it should also be noted that in accordance with the "excess costs" concept, a pull-out design need not be coordinated with a child's regular instruction. An LEA may decide to redesign its entire base program for children participating in a Title I program, in which case OE would not require that the LEA show that the types of services provided to such children were different; but rather that the LEA contributed its fair state and local funds to support the program. This particular design has been characterized as a type No. 2 design and is described supra., at p. 510 and summarized infra. at p. 552.

3. Application of the Excess Cost and Supplement, Not Supplant Provisions

a. Introduction--As explained supra., Congress enacted the excess cost provision in 1974 to further clarify the supplanting restrictions, although the concept was explained in 1968 by OE in Section 4.1 of Program Guide No. 44. The relationship between these two provisions has also been discussed supra. However, so that the reader can better understand the rationale for our conclusions, we have included at this point a summary explaining the application of these provisions.

Both the supplanting and the excess cost provisions prohibit discrimination against children receiving benefits under Title I in the provision of state and local funds.

These two sections of the statute provide that Title I may not be used to reduce the level of state or local funds which would be made available to such children in the absence of Title I.

These two provisions explain when and what standards to apply to determine whether a violation of the "supplement, not supplant" and excess costs provisions has occured.

There are two basic types of program design which an LEA can develop.

> (1) The LEA can design a (supplementary) program or project in which the regular classroom teacher retains ultimate and complete responsibility and control with respect to the educationally deprived child's school education, including the subject area in which the child is receiving special assistance pursuant to the needs assessment. There is continuous coordination between the regular classroom teacher and instructional staff person paid for out of state and local funds. This type of design can take place either in the regular classroom (in-class) or in a separate classroom (pull-out). The only difference is the physical location of the children. (type No. 1 design)
>
> (2) In the second type of program design, Title I funds are used to totally redesign or restructure a child's educational program. This type of program design may involve one subject area OR the child's entire school program. The regular classroom teacher is totally relieved of all responsibilities and control with respect to the child's education. This is called a "distinct program" in which the child receives his/her instruction in a separate classroom.

> It is not a pull-out program, as the term is traditionally used, because the child is neither returned to the regular class nor instructed by the regular classroom teacher (type No. 2 design).

With respect to a type No. 1 program design, where there is coordination between the regular classroom teacher and the teacher paid for with Title I funds and control is retained by the regular classroom teacher, there are two standards for determining whether the LEA has discriminated against children participating in Title I programs. First, does the Title I program expand and improve the child's instruction received in the regular classroom. Second, is it over and above that which is provided to children not participating in Title I programs, i.e., is it supplementary. Since this model provides for the expansion rather than the replacement of existing programs, the LEA need not contribute any state and local funds.

With respect to a type No. 2 program design, i.e., a "distinct program", the standard is whether the distinct program receives support from state and local funds commensurate with the level of support that would be provided to such children if they had remained in the regular classroom. In a "distinct program" design, state and local funds must support the base costs and Title I funds may then be used to pay for the "excess costs."

We conclude that these models are consistent with the existing statutory and regulatory provisions. Further, we conclude that because these models permit an LEA either to coordinate its Title I program with its regular program with its regular program or design a distinct program, they are not overly restrictive. The rationale for requiring the contribution of state and local funds under type 2 design but not under the type 1 design is that under type 2 design the LEA is replacing instead of expanding the existing program.

The above conclusion should not be construed to mean that these models are the best or only models which are consistent with the supplement, not supplant statutory and regulatory provisions. In fact, neither model, as presently drafted, ensures that 100 percent of Title I funds will be used to pay for supplementary services. At this point in time, we recommend that the existing policies remain in effect and OE continue to study the possibility of improving these models so that all Title I funds are used to provide supplementary services.

Armed with an understanding that there are two types of programs and a different measure applied to each type of program, the difficulty in determining whether, e.g. credit can be given, an LEA can pull-out for less than or more than one-half day, what type of class may a child be pulled from, is significantly reduced. The answers to these questions flow directly from the legal framework set forth above. Recall that the "supplement, not supplant" and "excess costs" provisions explains (a) that a child participating in a Title I program may not be penalized in the application of state and local funds because he/she is receiving special assistance under Title I and (b) that in no case may Title I funds replace the state and local funds that would have been provided, but for the existence of Title I. Title I funds may only pay for the excess costs of programs.

b. Credit and High Schools--The question of whether a high school student can receive credit is really not the issue. The issue is whether the child is receiving all of his/her English from the remedial teacher paid for totally out of Title I funds. This type of program falls under "type No. 2 program design" and therefore the state and local funds which are made available to other children for English must be made available to children enrolled in "Remedial Reading". The fact that a child does not receive credit or is taking "remedial reading" as an elective is irrelevant.

This conclusion is relevant to a comment we heard in at least two of the states included in our survey concerning the operation of Title I programs in high schools. It was explained to us that "on the basis of personal observations, Title I is apparently difficult to implement at the junior and senior high school levels as a supplementary, rather than a supplanting activity." When we asked the SEA Title I Director what he meant by "difficult to implement" he explained that it was difficult to implement a "type 1" pull-out program and therefore the LEA was required to design a distinct program wherein the program participants are entitled to their fair share of state and local funds.

c. Length of Pull-Out--The question of whether and when a pull-out program has a discriminatory effect with respect to the application of state and local funds to children receiving benefits under Title I is similarly dealt with under the legal structure set forth above. The question is not really how long a child is pulled out of his/her regular classroom, but whether it is possible to coordinate and truly supplement the child's regular classroom instruction, i.e., whether the regular classroom teacher can and does retain actual responsibility and control with respect to the child's educational program and whether coordination is possible. Certainly, any full-day program would prevent the retention of control and coordination. Thus, this would be a "type 2" program requiring the level of state and local funds which is generally made available to children not receiving benefits under Title I, be made available to children receiving such benefits.

In a program where the child is pulled out for one-half a day or longer, it is presumed that the regular classroom teacher does not or cannot retain the necessary control and sufficient coordination is impossible.

To the extent that a pull-out program is for less than one-half a day, it would seem that a regular classroom teacher has the capability of exercising control. The issue in such a situation then would be whether actual control is being exercised. One clear indication or condition to retaining control relates to whether there is continuous coordination between the regular classroom teacher and the Title I teacher paid for with Title I funds. OE should take the responsibility for describing minimum standards for determining whether sufficient coordination exists.

d. From Which Classes May A Child Be Pulled--Based on the legal framework set forth above, it would seem that the question of which class (i.e., the same subject area class in which the child is receiving remediation, another instructional area or a non-instructional area) is relevant to but not determinative of the question of whether there has been a discrimination, so long as there is coordination and the regular teacher retains control (type No. 1) or the "distinct program" has sufficient state and local resources being provided (type No. 2). This is in spite of the fact that it may be easier to pull a child out of the subject area in which he/she is receiving remediation.

4. Recommendations

The above summary explaining the application of the intra-school supplanting and excess cost provision supports the conclusion that OE is capable of, and has in fact, developed a rational and consistent, legal framework. From our survey of ten states, the level of understanding of the standards described above varied from state to state, although all of the states were aware of the general prohibition against penalizing children receiving benefits under Title I in the application of state and local funds; but only two states developed policies which virtually parallel the federal policy pronouncements.

To reduce the disparity of understanding between States, we recommend that OE include in its formal legal framework and in a manual disseminated to SEAs and LEAs the concepts and standards described above, including examples of how these concepts and standards should be applied in commonly occuring situations.

Furthermore, we recommend that OE develop legal models explaining the parameters of a non-supplantive program, especially with respect to in-class programs. The project was informed by SEAs and LEAs that fear of an audit results in LEAs designing particular types of pull-out programs rather than programs they prefer.

As stated supra., the Title I legal framework in no way requires the design of pull-out programs. However, the way in which Title I is administered by SEAs may encourage such programs. OE-developed model in-class program designs would help eliminate this undesired consequence, particularly if auditors, as well as LEAs, learn to recognize them. To date, OE has failed to inform HEWAA of the informal legal framework in sufficient detail so as to guide their actions. The manual we recommend should be used by the HEWAA as well as the SEAs, LEAs, and parents.

In addition, we recommend, infra, that OE continue to refine the two models described above, guided by the principle set forth in the statute that 100 percent of Title I funds are to be used to pay for supplementary services for children participating in Title I programs.

As stated supra., we have concluded not only that the present statute requires that intra-school supplanting be prohibited but that the concept is critical to any categorical aid program for the benefit of educationally deprived children in low-income areas.

The rationale for this conclusion is set forth supra. What was not addressed was the question whether it is meaningless to distinguish between those who are educationally deprived and those who are not where the number of educationally deprived children residing in a particular attendance area or enrolled in a particular school is 80 percent or greater. We recommend that the statute be amended to permit an LEA to design a program or project for an entire school if at a minimum 80 percent of the students are educationally deprived as defined. See infra. under the general aid provision section for the details of this recommendation.

The final recommendation concerns the definition of the term "excess costs" as set forth in the statute. We found that the language contained in the statute was incomprehensible to many of the SEA Title I Directors interviewed, although several SEAs were applying the excess costs concept in their materials, described supra. Generally, the excess costs concept requires that the LEA must contribute to the maintenance of a Title I program the amount it would have cost the LEA to educate these children in its regular program, i.e., Title I funds may only be used to pay for the excess costs of the program. We recommend that the statutory definition be clarified.

IV. Application Form, Monitoring Instrument, and Recordkeeping Requirements

A. Application Forms

SEA review of district and school level compliance with the "supplement, not supplant" and "excess costs" provisions is accomplished through application approval, monitoring, and recordkeeping procedures. In terms of these particular areas, the practices of states surveyed varied in scope, nature, and degree. Set out below is a discussion and analysis of those practices as well as our recommendations; other related recommendations may be found in the discussion of the "ordinarily provided" provision, Chapter 11 infra.

Current federal regulations specify that LEA applications must contain assurances that the use of grant funds will not result in a decrease of State and local funds or in any other financial penalties against project schools (45 C.F.R. §116.17(h)). By way of explanation, the regulations go on to indicate that Title I funds must supplement rather than supplant State and local funding.

SEA compliance with the above regulation has generally been limited to the required assurance. Most commonly, the LEA must sign a general statement that Title I funds will supplement, and not supplant State and local funds. However, such assurances can by no means constitute an independent SEA determination concerning the use of Title I funds. Recognizing this, a few states have required additional LEA application information.

By way of illustration, one state requires staffing narratives with instructions to the effect that "descriptions should be sufficient to enable the reviewer of the application to determine the average daily routine of the Title I staff and to determine that it is supplementary. The description should also indicate who is responsible for giving direction to the non-certified Title I staff." Another state application stands alone with its particularly detailed coverage of areas reviewed for supplanting violations:

> c. General Description. Give a narrative description of each instructional activity. Include the type and number of Title I staff assignments; special methods of instruction to be utilized; pupil/teacher ratio; class size; estimated amount of time each child will participate (minutes per day, days per week, number of weeks); instructional materials or equipment to be used; indicate whether there will be groupings of participants in regular classrooms and, if so, describe how these will be scheduled into the regular school day; indicate whether there will be grouping of participants in regular classrooms and, if so, describe how this will be accomplished. Describe how test data will be utilized in classroom planning. Indicate how pupil skills development information will be exchanged by the Title I teacher and the regular classroom teacher.

The application forms described above, which require more than mere assurances of compliance with the "supplement not supplant" provision are used only in a minority of states surveyed. Nevertheless, it is these states which are more likely to detect supplanting violations at the application review level in keeping with the overall SEA responsibility to review LEA application compliance for each Title I program requirement.

Therefore, in order to support the policy of independent SEA oversight contemplated by the Title I statute and regulations, we recommend that, in addition to the assurances required under 45 C.F.R. §116.17(h), LEA applications be required to briefly describe how the use of Title I funds is supplementary to the use of State and local funds, particularly in terms of staffing responsibilities, classroom organization and instructional materials. Supportive records and worksheets should be maintained by the LEA and at each school (see discussion _infra_). While the adoption of this procedure may not enable the SEA to discover all levels of supplanting violations, it will aid the SEA in spotting problem areas for further application inquiry or monitoring review. This recommendation should be read in conjunction with our similar recommendation concerning the "ordinarily provided" provision, _infra_, since the two areas are very closely related.

B. _Monitoring and Recordkeeping_

In the area of monitoring, current federal regulations require the SEA to "constantly monitor performance" as to "each function or activity of each grant" (45 C.F.R. §100(b)(431)). However, despite this general requirement and the limited nature of the application assurances given under 45 C.F.R. §116.17(h), few states have any formal monitoring procedures with regard to the "supplement, not supplant" provision.

Those few states which do formally monitor Title I programs to determine their supplementary nature make the monitoring inquiring set forth below. In one state, the monitoring instrument directs the reviewer to a general observation only:

> The Title I activities and/or services provided to students enrolled in the Title I project are supplemental to and do not supplant the district's regular educational program.

In a second state, the monitoring instrument contains the following questions:

> Does the project truly supplement the regular program?
>
> Do the groupings, class size, and pupil-teacher ratios correspond to the project application?

And, in a third state, the monitoring instrument paraphrases the "supplement, not supplant" regulations.

> The use of grant funds does not result in a decrease in the use of local funds for the education of project participants.
>
> The grant funds are used to supplement local state funds.
>
> The grant funds are not being used to provide services in project areas ordinarily provided in non-project area schools.

In sum, although many SEAs have explained their view of the importance of monitoring in this area, even those states which do address supplanting in their monitoring instruments do so in a superficial manner.

In order to address this situation, we recommend that federal regulations be supplemented by a specific minimum requirement of SEA monitoring as to all aspects of the "supplement, not supplant" provision. This is in keeping with the general monitoring requirements of current federal regulations as well as with the approach of the third state described above, although such monitoring inquiries would constitute only minimal compliance with the recommended change.

Federal recordkeeping requirements for Title I indicate only that the LEAs must keep those records deemed "necessary" by the SEA for assuring project compliance. However, few SEAs have specified recordkeeping requirements in the area of supplanting. One state which has acted in the area of recordkeeping requires a weekly teachers aide report as to the length of time spent in various specified activities, and the length of time and number of children worked with for both Title I and non-Title I activities.

Another state policy manual explains that:

> "The applying agency should also maintain records that will show with maximum clarity the use of Title I funds. The records should indicate (1) the receipt and disbursement of project funds; (2) the amount of time spent on project activities by each child and by each teacher or other individual employed.

In order to bolster the recommended application and monitoring procedures, as well as to encourage LEA attention to the "supplement, not supplant" requirement, we further recommend that documentation and worksheets supportive of the LEA application information be maintained by the LEA for each school and that more detailed records be maintained at each school. Perhaps the two categories of records specified by the second state above might be adopted into the federal regulations in order to implement this recommendation.

CHAPTER 10

COMPARABILITY

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CHAPTER 10
COMPARABILITY

I. Introduction

A. Overview of the Comparability Legal Framework

1. Purpose of the Comparability Requirement

The fundamental principle contained in the Title I legislation is that Title I funds must be used for programs which are designed to meet the "special" educational needs of educationally deprived children. As explained in earlier chapters, it is unreasonable to expect a compensatory effort to meet a child's "special" needs if a school district is discriminating against the schools he/she attends in the provision of the regular school program.

In recognition of this fact, the Title I legal framework includes a supplanting provision, an excess cost provision, a comparability provision, an ordinarily provided provision and a general aid provision. We have discussed supra. the supplanting and excess cost provisions and will discuss in later chapters, the ordinarily provided provision and the general aid prohibition. This section discusses the comparability provision.

The comparability requirement is intended to ensure that State and local funds will be used to provide services in project areas which are comparable, i.e., approximately equal to services provided to children attending non-project area schools, before the addition of Title I funds for project area schools. In other words, this requirement ensures that Title I funds will be used to provide additional services to project area schools.

The general purpose of the comparability provisions in relationship to the basic premise of the entire Title I legislation was expressed on the House floor by Congressman Quie of Minnesota (Volume 116, Part 8, 91st Congress, 2nd Session, at p. 10013):

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children this purpose is defeated... .

2. Federal Legal Framework

The requirement, as set forth in Title I legislation (Section 141(a)(3)(C)) provides that:

> State and local funds will be used in the District of the [LEA] to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such districts which are not receiving funds under this title. (emphasis added).

The regulations issued by OE include specific criteria for determining comparability. An LEA will be considered comparable if:

1. The number of children enrolled per instructional staff member (including both certified and non-certified personnel) for each Title I school is not more than 105 percent of the average number of children per instructional staff member in the entire district. Instructional staff members include, among other persons, teachers, principals, librarians, guidance counselors, and aides, and
2. the amount of State and local money spent on each child enrolled in a Title I school for instructional staff salaries is not less than 95 percent of the money spent per child in all non-Title I schools in the district.

If a school district has one school that is not comparable with respect to either of the above criteria, it must collect and report data on instructional materials and supplies for the entire school district. Each Title I school must then be comparable on all three criteria: ratio of pupils to instructional staff, per-pupil expense for instructional salaries, and per-pupil expense for instructional materials and supplies.

3. Regulatory and Legislative History

The regulatory and legislative history concerning the comparability provision is set forth below for the purpose of clarifying Congress' intent in including the provision.

The word "comparable" first appeared in Program Guide No.

44, Section 7.1 under the heading entitled "Title I Funds Supplementary to State and Local Funds". The relevant sentence reads: "the instructional and auxiliary services provided with state and local funds for children in the project areas should be comparable to those provided for children in non-project areas." The guideline then explains that particular attention should be paid to such services as "class size, special services, and the number and variety of personnel".

On June 14, 1968, OE issued Program Guide No. 45 which provided, in relevant part that "...Title I applicants in your state must assure that their state and local funds will be used to provide services in the project areas at levels that are comparable to those in non-project areas."

Subsequent regulations issued in 1968 incorporated the above concepts.

> For the purpose of this paragraph the failure to use state or local funds to provide to a project area or to children residing therein services comparable to those services which have been or are to be, generally provided to other areas or children will be deemed to constitute a penalization of that project area or of those children 162 / (emphasis added)

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162 / 45 C.F.R. §116.17(h) (1969) The DHEW General Counsel, Mr. Wilcox concluded that the broadened comparability requirement was sustainable as a further development of the prohibition against supplanting State and local funds. Memorandum of July 3, 1968 from the DHEW General Counsel of the Commissioner of Education.

Program Guide No. 45A issued on July 31, 1969 defined the term supplanting by using, in part the term "comparable", referring back to Section 7.1 of Program Guide No. 44. The guideline then adds,

> Applicants are required to assure you that they will maintain comparable levels of services in the Title I areas without regard to the use of Title I funds. To support this assurance applicants should be able to demonstrate comparability by showing that with respect to the use of state and local funds the ratios of (a) pupil to teacher, (b) pupils to other professionals, and (c) pupils to non-professionals are no higher for the Title I areas than for the non-Title I areas.

In addition to the introduction of demonstrated comparability in the level of services provided, OE also explained that,

> Also, in terms of variety, scope, and degree of participation the special services provided with state and local funds in the Title I areas should be comparable to those in the non-Title I areas .

Shortly after these guidelines were issued, the Commissioner on February 26, 1970, issued Program Guide No. 57 to clarify a number of questions provoked by prior statements concerning the meaning of the term "special educational needs". This regulations for the first time used the phrase "comparability" in a generic sense to include all expressions of policy related to defining the term "special".

Specifically, OE explained that "comparability" means that:

> Title I funds must not be used to supplant State and local funds which are already being expended in the project areas or which would be expended in those areas if the services in those areas were comparable to those for non-project areas. Within a district instructional and auxiliary services and current pupil instructional expenditures provided with State and local funds for children in project areas must be comparable to those services and expenditures provided for children in non-project areas. These services and expenditures must be provided to all attendance areas and to all children without discrimination. Services that are already available or that will be made available to children in non-project areas must be provided on at least an equal basis in the project areas with State and local funds rather than with Title I funds.

In addition, this program guide included for the first time "comparability" reporting requirements.

Prior to the date Program Guide No. 57 was issued, Robert Mardian, General Counsel, DHEW and Dr. Allen, Commissioner/Assistant Secretary for Education, disagreed over the legal authority of OE to issue comparability reporting requirements absent express statutory authority.

Mardian unequivocally sustained OE's authority regarding the issuance of the program guidelines and regulations discussed supra. but concluded that the phrase "special educational needs" did not authorize the issuance of the reporting requirements.

Dr. Allen disagreed stating, "because of my judgment that provision of comparable effort in target and non-target area schools is essential to the development of reasonably effective programs of compensatory education, I propose to strongly emphasize the department's commitment to the comparability principle."

Dr. Allen's view prevailed. Program Guide No. 57, which superseded Section 7.1 of Program Guide No. 44, all of Program Guide No. 45, and that portion of Program Guide No. 45A pertaining to comparability, was to be a comprehensive restatement or clarification of the meaning of the term "comparability".

As defined in this guideline, the term "comparability" used generally included the "supplement and not supplant" language (see supra.), the services "ordinarily provided" concept (see infra.), and added the requirement that each SEA must require the submission by the LEA of information demonstrating adherence to "comparability" based on criteria established by the SEA.

These criteria,[163] at a minimum, were to require information demonstrating:

1. comparability in the distribution of staff, based on a pupil/teacher ratio, pupil/non-teaching professional staff ratio, and pupil/non-professional staff ratio; and
2. comparability of specific services prior to addition to Title I funds, i.e., a description of the services (of the type applied for in the Title I application) already provided by state and local funds in project and non-project schools; and,
3. indicators that the average per pupil instructional expenditure in each project area school is equal to or greater than the average per pupil instructional expenditure in non-project area

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[163] Information requested pursuant to criteria 1,3, and 4 is of the type presently required under the comparability ratios. The information described in criteria 2 is relevant to the application of the "ordinarily provided" provision (see infra.).

schools; or,

4. comparability of total instructional personnel expenditure per pupil.

Two months after this guideline was issued, Congress amended Title I to include an express prohibition against using Title I funds to supplant and not to supplement state and local funds and a provision which generally requires comparability of services between project and non-project area schools.

The legislative history indicates that the basic concepts and terminology adopted by OE in its program guides and regulations were adopted by Congress. Thus, during the floor debate, Congressman Quie made reference to Program Guide No. 57 discussed supra. and reiterated the proposition that

> the purpose of this language is to assure that Title I funds are being used for compensatory education, not for educational programs that the school district provides in other non-Title I schools. To assure that Title I funds are being spent over and above local and state funds, the Office of Education has asked school districts to provide state educational agencies with details concerning their Title I and non-Title I schools. The language reported by the conference is intended to reinforce the Office of Education's request. Unless the services offered in each school, taken as a whole, are compared against the services offered in a non-Title I school, the achievement of comparability cannot be ascertained... . (emphasis added)

Congressman Quie also explained that the comparability concept properly existed as part of the federal legal framework before Congress expressly added it to the Title I statute,

> I am confident that the law required this [comparability of services between poor schools and schools in more favored sections] even before the Senate added any specific language, before the law required that Federal funds not be used to replace State and local funds... the purpose of this language is to assure that Title I funds are being used for compensatory education, not for educational programs that the school district provides in other non-Title I schools... . 164/

Furthermore Congress clarified the meaning of the phrase appearing in the statute that "services in project areas which, taken as a whole, are at least comparable...". The Conference Committee Report to the Senate explains, "by the phrase 'as a whole', the conferees intend that all the services available to students must be taken into consideration--books, equipment, and instructional staff." 165/

Finally, Congress explained that the LEA has the affirmative responsibility of providing to project area schools substantial equivalence in such matters as pupil to staff ratios as well as available courses and services.166/

164/ 116 Cong. Rec. 10613 (daily ed. April 17, 1970).

165/ 116 Cong. Rec. 8887 (daily ed. March 24. 1970); See also 116 Cong. Rec. 10614 and 10616 (daily ed. April 2, 1970).

166/ It appears that the latter directive, i.e., that project areas be provided with substantial equivalence in available courses and services has been implemented by OE through the promulgation of the ordinarily provided regulation rather than in §116.26 which is entitled "Comparability of Services".

> In enforcing clauses (B) [supplanting] and (C) [comparability] ..., the Commissioner is expected to look to the services available to children in Title I projects compared with services available to children outside project areas and hold state and local educational agencies responsible for determining comparability of services and expenditures, and emphasize substantial equivalence in such matters as pupil-staff ratios, available courses and services, and average teacher compensation. 167/ (emphasis added)

Interestingly enough there was little disagreement over the question of whether the comparability provision should be included. The major issue for discussion was whether longevity should be included for purposes of computing expenditures per pupil for instructional salaries. As explained in the conference report to the Senate, "salaries of instructional staff are to be considered only to the extent that salaries are a measure of services available to students. Salary increments based on length of service are not intended to be a measurer of the service available...". 168/ The Congressional debate concerned whether these sentences should be supported. Although the debate is unclear, it appears that the above statement was adopted by both houses. By so concluding, the OE's statements of policy in Program Guide No. 57 which included longevity was expressly rejected.

167/ 116 Cong. Rec. 10613 (daily ed., April 7, 1970).

168/ 116 Cong. Rec. 8887 (daily ed., March 24, 1970).

The comparability regulations, as promulgated by OE following the addition of the comparability provision to the Title I statute, incorporated several of the ratios initially included in Program Guide No. 57, but also involved several significant changes.

First, OE established one set of criteria rather than allowing SEAs to establish their own standards. Second, the regulations expressly excluded longevity for purposes of computing expenditures per pupil for instructional salaries, consistent with the legislative history. Specifically, five ratios were included in the regulations: (1) the ratio of pupils to certified classroom teachers, (2) the ratio of pupils to other certified instructional staff, (3) the ratio of pupil to non-certified instructional staff, (4) expenditure per pupil for instructional salaries, exclusive of longevity, and (5) expenditure per pupil for other instructional costs. Subsequent amendments to the comparability regulations have reduced the number of ratios included down from five to two (a third ratio is included for those LEAs which failed to comply with the first two ratios). The reason for the reduction was explained by OE: "the three separate ratios...tend to rest LEAs to conventional staffing patterns which are not necessarily the mo effective for schools serving children from low-income families." 169/

169/ 38 FR 7438 (March 21, 1973)

B. Organization of This Chapter

The preceding subsection of this chapter described and explained the purpose of the comparability provision, its legislative and regulatory history, and the basic statutory and regulatory language. Subsequent sections of this chapter will analyze the various components of the comparability provisions including, among other things, an analysis of the existing three ratios set forth in the regulations, the grouping of schools by size as well as by grade span, SEA responsibilities with respect to non-complying LEAs, and the maintenance of comparability provisions.

C. Major Findings, Conclusions, and Recommendations

The primary reason Congress expressly incorporated the comparability requirement into the Title I statute was that many school districts were spending smaller sums of state and local funds on educationally deprived children in poor areas.

The intention of Congress, when it enacted Title I, was to provide extra federal funds to students who were educationally deprived and resided in poor areas. However, to the extent that students in Title I project area schools fail to receive their fair share of state and local funds, the federal expenditures were not supplementary as intended by Congress.

We conclude that the categorical nature of Title I as an act intended to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income areas requires that this statutory provision be maintained.

The SEAs included in our survey generally expressed strong support for the concept imbedded in the comparability requirement. One state explained it this way, "the comparability requirement is a plus because it has brought some districts around to allocating resources on a rational basis-therefore allocations are less prone to political pressure." Another state explained that "although the completion of comparability reports results in a number of administrative headaches for LEAs, it is a necessary headache with substantial beneficial effects in ensuring equal educational opportunity". Another SEA explained that the comparability requirements "have forced LEAs to keep better records and therefore be more accountable to all citizens".

This is not to say that the SEAs are in total agreement with the criteria established by OE for measuring comparability. A number of SEAs expressed their concern that the existing regulations restrict innovative staffing patterns and other decisions respecting resource allocation by schools within a district, especially where allocation decisions are made by principals and local parent groups rather than the central board.

The issue then does not relate to the statutory requirement but rather to whether the comparability regulations are too precise, i.e., whether they restrict the ability of LEAs to develop and implement innovative programs? Insofar as this is an empirical question relating to LEA staffing and expenditure practices, it is beyond the scope of this study. NIE expects to obtain information from other researchers concerning this issue. It may be that many contentions concerning this inflexibility do, in fact, cause substantial problems. On the other hand, several SEA Title I Directors indicated that these contentions may be more hypothetical than real. As one Director explained, "these contentions are often a pretense for allowing the perpetuation of inequitable treatment of schools serving poor children."

There are, however, several issues raised by SEAs which we are able to address. For example, the position was advanced that if a state statute or LEA resolution assured that each Title I school would receive, at a minimum, the same level of instructional services (not including e.g., expenditures for discipline, security aides and guards, or maintenance) as non-Title I schools and that as of a certain date the LEA could demonstrate, using actual, as opposed to estimated, figures that such a policy was being followed, then the LEA should not be required to comply with the criteria established by OE since its formula would be more comprehensive than OE's criteria, i.e., it covers expenditures for all services.

We recommend that OE seriously investigate this alternative. We believe such an alternative set of ratios is supportable if and only if they reflect the level of instructional services offered and not simply equal dollars, since in the project area schools a relatively high percentage of state and local funds often must be used for non-instructional purposes, e.g., security, discipline, and maintenance.

We also recognize, however, that few SEAs or LEAs have developed the types of policies described above. But their development should not be discouraged.

Nothing in the above recommendation should in any way be construed to prohibit the state or LEA from providing additional services to the Title I schools with state and local funds. Recall that comparability is a one way street i.e., it assures that Title I schools have not been discriminated against in the provision of services by the LEA. It does not assure that non-Title I schools receive services equal to those provided in Title I schools. This is because the primary purpose of the comparability provisions is to ensure that Title I funds are supplemental and are not used to replace state and local funds. The purpose is not to require intra-district equality, although that may be its generally accepted effect.

In addition to this fundamental recommendation, we have recommended that certain aspects of the existing comparability regulations be modified to allow greater flexibility. These recommendations include, among other things, permitting the SEA, under specified circumstances, to choose the date it uses for state purposes instead of the date determined by OE for demonstrating comparability and allowing four instead of three groupings where a state school finance formula uses certain weightings.

In addition to the basic issues discussed above concerning the Title I legal structure, we also found, at least in one state, that an SEA, which was concerned with fulfilling its oversight responsibilities to the point of withholding funds for a violation of the comparability provisions and defending its actions in an administrative hearing, received little support from OE, much to the dismay of the SEA. As the SEA explained, "if OE won't support us on this issue, then I'm sure they won't go out on the limb for us should we decide to withhold funds for violations of some other requirement which has not received the same attention as comparability." This situation will be described in more detail *infra*.

II. The Components of the Comparability Legal Framework

A. Introduction

Unlike some of the other LEA Title I program requirements, the comparability regulation is clear and precise. When OE includes statements regarding the comparability provisions in other documents, e.g., guidelines, handbooks, or written correspondence, these documents generally quote from the regulation rather than adding new or different standards. That is not to say that there are no ambiguities in the regulations. But, we have concluded that they are generally minor.

The absence of ambiguities does not mean that the regulations have been free from controversy. To the contrary, SEAs, which in the main expressed strong support for the concept, also identified a number of problems with certain specific aspects of the regulations. The purpose of this segment of the paper is to describe the specific components of the comparability regulation and then describe and analyze, where appropriate, the existing problems and ambiguities identified by the SEAs included in our survey.

B. A Comparison Between Each Title I Project School and The Average For Non-Title I Project Schools

The existing regulations require that the comparability determination be made by comparing each Title I school to the average for the non-Title I schools. Specifically, the SEA must not approve a LEA Title I application or make payments of Title I funds under a previously approved application

> unless that local educational agency has demonstrated, in accordance with paragraph (c) of this section, that services provided with State and local funds in Title I project areas are at least comparable to the services being provided with State and local funds in schools serving attendance areas not designated as Title I project areas. 170/ (emphasis added)

170/ 45 C.F.R. §116.26(a)(1974).

Two states expressed the opinion that it was unfair, and arguably contrary to legislative intent, to compare each Title I school with the non-Title I average. Rather they suggested that LEAs should be required to compare the average for the Title I schools to the non-Title I average.

We have concluded that such a policy change would not only be inconsistent with legislative intent which, if anything suggests that each Title I school should be compared to the highest ranked non-Title I school,[171] but could severely compromise the fundamental policy of Title I that programs be designed to meet the "special" educational needs of educationally deprived children residing in each project area.

Employing an average for project area schools means, by definition that some Title I schools might be above and others below the average. To the extent there are Title I schools which are significantly underfunded, the children attending such schools would not be receiving supplemental services; rather, Title I funds would be used to replace state and local funds. The following example illustrates this point.[172]

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[171] See e.g., 116 Cong. Record 10614 and 10615 (daily ed. April 7, 1970).

[172] In this example assume that the size of the school population is constant.

Project Area Schools		Non-Project Area Schools	
$800	$200	$400	$400
$200	$400	$400	$400

Project Area Average $400

Non-Project Area Average $400

Clearly, the services provided with state and local funds in the project area schools receiving $200 per pupil will not be comparable to the non-project area schools receiving $400 per pupil. Therefore, the Title I funded services provided in those schools would not be supplemental.

We recommend that the suggestion advanced by several states that the regulations compare the project area average to the non-project area average be rejected as being inconsistent with the purpose of the comparability regulation and the explanatory statements set forth in the legislative history (see supra. at p. 577 explaining the statutory phrase "taken as a whole" modifies services and not project areas.

The second area raising substantial policy questions concerns the use of the non-Title I average as the "yardstick" for demonstrating comparability. We have concluded that the averaging approach adopted by OE permits significant inequities. The first possible inequity results from the possible wide variations in the schools constituting the non-Title I average. The second inequity concerns the inclusion of Title I eligible but not targeted area schools in the non-project area average. Proposed regulations have reduced the impact of the latter inequity.

With respect to the first type of inequity, i.e., the problem of wide variations, the following example is illustrative.

Title I Project Area Schools		Non-Project Area Schools	
$500	$500	$600	$600
$500	$500	$600	$200

In this hypothetical school district there are four project area schools and four non-project area schools, all having a student enrollment of 800. The non-Title I average for instructional salaries per pupil is $500 ([600 + 600 + 600 + 200] ÷ 4 = 500). Without reference to the 5 percent leeway allowed under the Title I regulations, it is clear that comparability has been attained in this school district.

Three out of the four non-project area schools will have an additional $80,000 ($100 x 800) to spend on instructional services which will not be available to any of the project area schools.

There are at least three policies which OE could pursue which would alleviate the potential inequity described above.

The first alternative would be to require that each Title I school must be comparable to the non-Title I school which is most favored with respect to each comparability criteria. Thus, for example, the non-Title I school that has the highest per pupil expenditure rate would be the standard rather than the non-Title I average.[173]

A second way to deal with the problem of wide variations would be to require that the standard deviation for the non-project area schools, or some other measure of variance, could not exceed a certain tolerance. The exact extent of this tolerance would have to be worked out.

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[173] Note that we are talking about all schools within a particular grade span grouping.

A third alternative would be to require that the standards for demonstrating comparability[174] vary, depending on the degree of variation between schools constituting the non-Title I average. The greater the degree of variation between the schools constituting the non-Title I average, the greater the level of services which must be provided at each Title I school. Set forth below are examples clarifying this alternative. In the examples, assume an enrollment of 600 pupils at each school.

Example 1

Title I		Non-Title I	
$570	$570	$610	$600
$570	$570	$590	$600

In this example, there is no significant variation among the schools included in the non-Title I average. OE in this situation might apply the existing standard described in footnote 174 . Under this standard the expenditure per pupil must be at least 95 percent of the non-Title I average. Applying the 95 percent standard of measure, all of the Title I schools are comparable ($600 x .95 = $570).

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[174] Under the second ratio presently contained in the regulations, the standard measure is that the expenditure per pupil for instructional salaries is at least 95 percent of the average for non-Title I schools.

Example 2

Title I		Non-Title I	
$475	$475	$610	$600
$475	$475	$590	$200

Here the non-Title I average is $500 and under the 95 percent standard, the LEA could expend $475 at each Title I school and satisfy the comparability ratios, even though three out of the four non-Title I schools have from $69,000 to $81,000 more dollars (e.g., $135 x 600 pupils =$81,000) than any of the Title I schools. This results from the wide variation in the non-Title I average (a range from $200 to $610).

Under the third alternative described above, OE could require that the standard of comparability be, for example, 115 percent of the non-Title I average or $575 ($500 x .115 = $575).

Note that where there is no significant variation in the schools constituting the non-Title I average, the standard is $570. Where there is wide variation in the level of services provided at non-Title I schools, the sliding scale approach virtually eliminates the arbitrary effect of such variation on the comparability standard.

Note further that unlike the second alternative described above, the third alternative does not require any control over the level of services provided to the schools not receiving Title I funds.

At this point in time, the project is unwilling to recommend that any particular alternative be chosen without further study by OE.

In sum, we recommend that OE undertake a study which will (a) document the extent of actual inequities resulting from the use of the non-Title I average and (b) if inequities are found, make specific recommendations concerning the elimination of these inequities.

A related problem concerns the inclusion of eligible but non-targeted area schools in the non-project area average. There are two aspects of this issue--the first problem concerns the situation where a high ranked eligible Title I school (which has substantially less services than other schools in the district) is skipped and then, placed in the non-project area average to bring that average down. This problem has been substantially eliminated by several proposed regulations.[175] For example, if a school district skips a high ranked eligible school which has a substantially lower incidence of educational deprivation, the skipped school is not included in the non-project area average and the school district must still show that the services provided in the skipped school are comparable to the non-project area average.

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[175] §116a.20(c)(2), 40 FR 11481 (March 11, 1975).

Of course the problem still remains in those school districts which, although they do not skip any eligible schools, still do not have sufficient funds to provide programs in the lowest ranked eligible but non-targeted schools. In this case, these schools are included in the non-project area average.

A second problem concerns a provision in the proposed regulations concerning the skipping of Title I eligible schools which are receiving funding from state or local compensatory education programs which are similar to Title I. The example set forth below illustrates the potential problem.

Title I Schools	% Low-Income	Expenditure Per Pupil State and Local Funds (not including state or local compensatory education funds)
School A	60%	$200
School B	55%	$200
School C	40%	$700
School D	40%	$700
School E	10%	$700
School F	10%	$700

Assume that the district-wide average of children from low-income families is 30%, all schools at or above the 30%

level are eligible to receive Title I funds (see supra. at pages 135 through 137). Thus, schools A-D listed on the previous page are Title I eligible and schools E and F are ineligible.

Under the proposed regulation, the LEA can use the state or local compensatory education money to fund a program in schools A and B and use Title I funds in school C and D. If the school districts pursues this strategy the highest ranked schools would be included in the non-Title I average.

This OE policy would have a dramatic effect on the non-Title I average.

First, if schools A and B are not included in the non-Title I average, that average would be $700 per pupil. If the schools are included, the non-Title I average is $450 ([200 + 200 + 700 + 700] ÷ 4 = 450), thereby lowering the non-Title I average by $250.

We recommend that the policy set forth in the federal regulations concerning the skipping of schools which have state or local compensatory education programs be the same policy which applies to schools which have been skipped because they have a lower incidence of educational deprivation. That policy provides that the skipped school (a) must not be included in the non-Title I average and (b) the services provided to it must be at least comparable to the non-Title I average.

C. The Three Ratios

1. Introduction

As explained *supra*., the existing regulations generally define the term "comparability" with respect to three ratios. The discussion which follows analyzes the significance of OE's decision to define comparability in this manner, the alternatives to the existing criteria, the inclusion of longevity in the comparability reporting, and, finally, the alternatives to the third ratio. But before we analyze any of these issues, it is important that we set forth the federal legal framework.

2. Federal Legal Framework

Paragraph (c) of §116.26 of Title 45 of the *Code of Federal Regulations* generally provides that services being provided by the LEA with state and local funds in a project area will be deemed to be comparable to the services being provided with state and local funds in non-project areas if each Title I school has ratios of children to instructional staff and expenditures per child that are approximately equal to those ratios for the average of the schools not receiving Title I funds. If any school is not "comparable" according to these ratios, the LEA, in addition to correcting this, must also demonstrate that expenditures for instructional materials and supplies are comparable. The regulations specify that services will be considered comparable in Title I schools If:

> "(a) the number of children enrolled per instructional staff member...for each public school serving a Title I project area is not more than 105 percent of the average number of children per instructional staff member in all other public schools in the applicant's district;"[176] and (b) "the annual expenditure per child [for instructional staff, exclusive of longevity], in each public school serving a project area is not less than 95 percent of such expenditure per child in all other public schools in the applicant's district."[177]

Furthermore, paragraph (c) of §116.26 provides that any LEA in which one or more schools are non-comparable in either of the above ratios, must demonstrate that the expenditure per child for textbooks, library resources, and other instructional materials and supplies in each public school serving a project area is not less than 95 percent of such expenditure per child in all other public schools in the district.[178]

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[176] 45 C.F.R. §116.26(c)(1)(1974).

[177] 45 C.F.R. §116.26(c)(2)(1974).

[178] 45 C.F.R. §116.26(c)(3)(1974). The comparability report must contain information showing the amount expended in total per child for textbooks, library resources and other instructional materials and supplies "including the amount expended in previous years for all such items "that have been or will be made available for use in the current year. 45 C.F.R. §116.26(b)(7)(1974).

3. Comprehensiveness of the Existing Criteria

An analysis of the legislative history indicates that, at a minimum, the following items must be included in determining whether "services, taken as a whole" which are provided in project area schools are at least comparable to those provided in non-project area schools:

(1) pupil-staff ratios,[179]

(2) average teacher compensation (excluding longevity),[180]

(3) books, equipment,[181]

(4) available courses and services.[182]

The existing criteria included in §116.26 entitled, "Comparability of Services" cover points (1)-(3) above. Point (4), although not covered directly under §116.26 arguably is covered under the so-called "ordinarily provided" regulation which is discussed *infra*. in the next chapter.

In sum, it would appear that to the extent OE requires that school districts demonstrate comparability in terms of these four items, they are operating consistent with the Congressional intent.

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[179] See *supra*. at p. 570.

[180] *Id*.

[181] *Id*.

[182] *Id*.

4. Alternatives to the Existing Criteria

In several states included in our survey, it was suggested that alternative criteria for determining comparability should be permitted if they ensure comparability of services to the same extent as the existing criteria.

For example, one state, which has passed state-wide school finance reform legislation which ostensibly requires equal expenditures to the child level explained that requiring compliance with both ratio 1 and 2 "precludes the implementation of several important practices of school administration and program innovation."

Specifically, the SEA explained:

> Specifically, the concept of budget decentralization or discretion at the school level with parent and citizen involvement is contradicted by the rigid categorical measures for comparability. If maintained, the proposed categories for comparative measures would seriously mitigate against the utilization of innovation practices:
>
> 1. differentiated staffing from school to school is restricted because Title I schools must be staffed according to the average school in the district.
>
> 2. program implementation from school to school may vary with emphasis from capital-intensive to personnel-intensive.
>
> 3. program design among school attendance areas should reflect the varying needs and interests of parents and other residents and this may not be possible because of rigid categorical measures.

This SEA has recommended to OE that it adopt the following proposal, providing that where a state goes beyond the three ratios contained in the existing regulations in terms of assuring equal expenditures between schools in a school district, that state, meeting certain requirements (set forth below), should be permitted to negotiate with OE regarding the establishment of specific criteria for demonstrating comparability.

> 1. That the state adopt a statewide equalization program for at least 80% (or 90%) of all state and local operating funds,
>
> 2. that this equalization program must be applicable at the individual school level,
>
> 3. that dollars expended for each child's educational program become the measure of "comparability of services", provided parents are realistically involved in the decision making process.

An LEA in one of the states we visited has developed a system utilizing uniform policies and formulas for the distribution of all state and local resources to each school in the district, not simply certain services measured by the existing ratios. Further, the LEA contends that under its system it can demonstrate the level of funds the schools are actually receiving on a periodic basis.

In analyzing the merits of allowing LEAs or SEAs to develop alternative criteria for measuring comparability, the following issues should be considered.

- Does the empirical data, showing that an LEA is able to comply with alternative criteria, also show that the LEA is unable to comply with the existing criteria or is the problem more hypothetical than real?
- Does dollar equality provide equality in the instructional services provided to children?
- Assuming that the empirical data show that alternative schemes are relatively more flexible, should OE nonetheless not permit alternative schemes given the central importance of comparability in ensuring that project participants receive supplementary services and the potential increased administrative problems, which might result in any monitoring effort?
- Should any alternative scheme proposed still be required to demonstrate as of a point in time that actual services provided in each project area school are comparable to non-project area schools?

We recommend that OE undertake a study of these issues. Further, we recommend that OE allow an alternate scheme only if

(a) the empirical data shows that there is in fact a significant problem in compliance with the existing criteria;

(b) under the alternative scheme, the LEA must still demonstrate that, as of a given point in time, the actual services are comparable (estimates or proposed expenditures should be unacceptable);

(c) the state or local allocation scheme ensures that instructional "services, taken as a whole", rather than merely dollars, are comparable. A formula allocation of dollars would not automatically be sufficient (the rationale for this proviso is set forth below);

(d) any increased problems in the effective oversight by SEAs and HEW associated with the use of different schemes rather than one uniform reporting form are minimal;

(e) the LEAs are required to report under both schemes for a number of years so that empirical studies can be made concerning its effect on comparability.

5. The Definition of Instructional Staff Members

The major question for consideration under the existing criteria with respect to the development of any alternative criteria concerns the definition of "instructional staff members".

§116.26(b) of the comparability regulations defines the term "instructional staff members" to mean

> members who render direct and personal services which are in the nature of teaching or in the improvement of the teaching-learning situation. The term includes teachers, principals, consultants, or supervisors of instruction, librarians, and guidance and psychological personnel; it also

> includes aides or other paraprofessional personnel employed to assist such instructional staff members in providing such services.

The legislative history cited to supra., especially the discussion explaining why longevity should not be included in the expenditure per pupil for instructional salaries, concludes that only those services directly related to the instruction of the children should be measured. The question then is whether e.g., janitors, security guards, [183] and individuals whose primary responsibility is discipline should be included?

It is our conclusion that such individuals should not be included and that the definition need be amended only by the addition of a sentence which states that:

> the term does not include janitors, security guards, attendance personnel or any other personnel whose primary responsibilities are security, discipline, or maintenance .

Any alternative scheme which simply allocates equal dollars per pupil may not ensure comparability of services. The buildings may be older and there may be increased vandalism, resulting in a greater amount of dollars in those area school's budgets going to maintenance and operation and the larger janitorial staff, with less funds left for instructional services.

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[183] It is our opinion that under the existing regulations, neither janitors nor security guards may be included. We raise this issue to add certainty and clarity.

Further, in project area schools, it may be necessary to hire additional security guards and disciplinary personnel. We question whether such individuals render direct and personal services in the nature of teaching or the improvement of the teaching-learning situation. While perhaps necessary, such personnel should be considered no more instructional than the custodial personnel.

Again, if comparability is simply measured in terms of equal dollars, those schools hiring a relatively high percentage of e.g., security guards, by definition would have proportionately less to spend on instructional staff.

6. Inclusion of Longevity in the Comparability Report

Another issue raised by several SEAs concerned the inclusion of longevity in the comparability report although it is not included in the computation of the second ratio. We recommend that the regulations continue to include the submission of longevity information in the report.

The issue over whether such information should be included is whether the benefits of reduced costs and effort on behalf of the LEAs in not having to report the longevity figure outweighs the difficulties that state and federal educational agencies and interested parents and other citizens will encounter in their efforts to determine whether or not LEAs have adequately complied with the comparability requirements.

Without the benefit of the longevity data being included in the comparability reports, any serious efforts to monitor local district compliance would require that supporting documentation on longevity be consulted. In other words, without the inclusion of longevity, comparability data would no longer approximate other budget data reported by the district. Furthermore, the additional formal reporting requirement of noting longevity pay is a small burden for school districts to bear, inasmuch as they would have to collect salary data on the included staff in any event.

7. The Third Ratio

The third ratio has been the subject of much discussion. As explained supra., the existing section of the comparability regulations provides that where an LEA fails to comply with the first two ratios it must demonstrate comparability with respect to a third ratio measuring other instructional costs, e.g., textbooks and instructional materials and supplies.

Several of the SEAs we visited explained that many LEAs are not able to document compliance with this ratio because their accounting records are not designed to document such expenditures. Thus, several SEAs explained to us that those LEAs which must report this third ratio, due to non-compliance with one of the first two ratios, simply include estimates or just "fudge" the figures.

In a number of states, the SEA allows the LEA to demonstrate compliance with this ratio if the LEA has issued a policy requiring the distribution of funds for "other instructional costs" pursuant to a uniform formula, e.g. $100 per pupil. This policy is inconsistent with existing OE policy. In a letter to a State addressing the issue of whether the LEA may demonstrate compliance with all three ratios, OE explained:

> School Board action authorizing the allocation of resources in and of itself is not sufficient to demonstrate to your agency that the LEA has met the requirements under Title I concerning the comparability requirements .

We recommend that OE require all LEAs (not just those which failed to comply with the first few ratios) to demonstrate comparability in accordance with this criteria or in the alternative, that theLEA adopt specific policies which allocate expenditures for such services in project area schools on a basis, which is, at a minimum,comparable to that for non-project areas. At the end of the school year the LEA must be able to demonstrate that the actual allocation of dollars was comparable. We conclude that the legislative history requires actual comparability and not theoretical comparability.

Two states described the problem faced by LEAs in complying with the third ratio where new schools have been constructed. In the year of their completion, extraordinary expenditures for other instructional costs may occur, possibly affecting the non-Title I average. We recommend that during the first year of operation of a new school, expenditures for other instructional costs at that school not be included in the district-wide computation and that any formula allocation scheme take this extraordinary situation into consideration.

D. The Grouping of Schools

1. Introduction

The existing regulations generally permit the LEA to group its schools by corresponding grade levels not to exceed three groups, except where a district has schools serving nine or more grade levels above kindergarten; in which case, such schools may be considered as a separate group constituting, if necessary, a fourth group.

Specifically, §116.26(f) provides:

> For purposes of this section a local educational agency shall group its schools by corresponding grade levels not to exceed three such groups (generally designated as elementary, intermediate or junior high school, and high school or secondary) for all the schools in the agency's district. A school serving grades in two or three such groups shall be included in that group with

> which it has the greatest number of grades in common. Where the number of grades in common are equal between two or more groups, the school shall be included in the lower grade division. For example, a local educational agency might have the following grade span organization: K-6 (elementary), 7-9 (junior high), and 10-12 (senior high). In addition, the local educational agency might have an intermediate school serving grades 5-8. Since this intermediate school has two grades in common with the elementary division (grades 5 and 6) and two grades in common with the junior high division (grades 7 and 8), it would be included in the lower grade division (elementary) for determining comparability. However, schools serving nine or more grade levels above kindergarten may be considered as a separate group which may, if necessary, constitute a fourth group.

Two issues pertaining to school groupings were raised by SEAs included in our survey. The first issue concerns the significance of school size with respect to demonstrating comparability. The second concerns the grouping of schools in states which have special weightings in their school finance formula.

2. School Size

Several SEAs included in our survey expressed the opinion that the existing regulations do not recognize the effect of school size on staff ratios and expenditures per pupil.

Since it was beyond the scope of our project to investigate empirically the significance of size differentials, it is important to describe how a court, faced with empirical evidence dealt with this question. We will describe the court case first.

In 1954, the Supreme Court decided Bolling v. Sharpe,[184] a companion case with Brown v. Board of Education[185] and three other state cases. In Bolling, the District of Columbia's racially segregated public school system was held to violate the due process clause of the Fifth Amendment.[186] In 1967, the District Court of the District of Columbia held, among other things, in Hobson v. Hansen,[187] that racial and economic discrimination in the operation of the D.C. public school system "unconstitutionally deprive[d] the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children."[188] Judge Skelly Wright ordered: (1) an injunction against racial and economic discrimination in the public school system (2) abolition of the track system (3) abolition of optional attendance zones (4) transportation to permit volunteering children in overcrowded school districts east of Rock Creek Park to attend under-populated schools west of the Part (5) a pupil assignment plan to eliminate racial and economic discrimination (6) substantial faculty integration and (7) a teacher assignment plan to achieve faculty integration.[189]

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[184] 347 U.S. 497 (1954). See also Carr v. Corning, 182 F. 2d 14 (USCA D.C. Cir. 1950) and Browne Jr. High School PTA v. Mardeburger, 183 F. 2d 14 (USCA D.C. Cir. 1950), two suits that challenged inequities in the dual school system in D.C. rather than de jure segregation.

[185] 347 U.S. 483 (1954)

[186] 347 U.S. 497, 500 (1954)

[187] 269 F. Supp. 401 (DDC 1967), aff'd en banc sub nom Smuck v. Hobson, 408 F. 2d 1975 (DC Cir. 1969) hereinafter cited as Hobson I

[188] 269 F. Supp. at 401

Judge Wright assumed that compliance with the desegregation aspects of his order "would have the secondary effect of equalizing resource distribution [and]...deferred any more specific remedy for the inequality in per pupil expenditures."[190]

This "secondary effect" did not occur. In 1970, Hobson returned again[191] to the court, argued that the hoped for equalization of per pupil expenditures had not occurred, and requested further relief and enforcement. In 1971, the court, in Hobson II, ordered the school system to equalize, within its elementary schools, per pupil expenditures for teachers salaries and benefits. Equalization was defined as being within ± 5% of the district wide mean.[192] Thus, the court fastened on equal resources as one measure of equal educational opportunity in the public schools of the District of Columbia.

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[189] 269 F. Supp. at 517

[190] Hobson v. Hansen, 327 F. Supp. 844 (DDC 1971), herein cited as Hobson II.

[191] Hobson first returned to the court in 1969 and filed a motion for further relief and enforcement. In 1970 he filed an amended motion for further relief and enforcement.

[192] 327 F. Supp. at 864. The court permitted expenditure deviations greater than ± 5% if there was "adequate justification."

The defendants in Hobson II sought to rebut the plaintiff's showing of inequalities in per pupil expenditure by arguing that, to the extent there existed variations in per-pupil expenditures among the D.C. schools, these variations could be explained by the size of the schools. The statistical principle relied upon by defendants was that of "economy of scale" (i.e., the concept that the general cost of per pupil output decreases as the scale of operation increases). Applied to the D.C. school system, the economy of scale argument was that as the size of a school increased, its cost per-pupil to provide instruction would decrease.

The court generally rejected the defendants economics of scale argument as it related to expendituresper pupil for instructional salaries for lack of sufficient probative evidence in support of their claims. Therefore, the court determined that size could not be considered in determining compliance with the Hobson II standard,[193] unless the district could expressly demonstrate its significance.

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[193] 327 F. Supp. at 853.

A recent study prepared by the Education Policy Research Institute entitled, "A Quest for Equal Educational Opportunity in a Major Urban School District: The Case of Washington, D.C." analyzed school district data to test Judge Wright's findings.

The author concluded that "the data serves to support Judge Wright's decision rejecting the economies of scale notion.... "The data showed that when schools were grouped by size and the schools serving affluent and poor areas with each size group were compared (p. 116), schools serving more affluent areas expended from 34 percent and 102 percent more than poor schools of comparable size.

For example, a poor school with an enrollment of 385 expended $486 per pupil whereas a wealthy school with an enrollment of 371 expended $817 per pupil.

The most interesting aspect of the data was that expenditures in the more affluent schools appeared consistent with an economies of scale argument, i.e., smaller schools spend more; however, schools serving the poor had few funds to spend, irrespective of size.

For example, the poor schools ranged in size from 296 to 792, with only a range in expenditures per pupil from $499 to $529, a difference of 30 dollars. The wealthy schools ranged in size from 251 to 766, with a range in expenditures per pupil from $1009 to $766, a difference of $243.

In an HEW Audit Agency report entitled "Review of the Implementation of Comparability Provisions" the audit agency analyzed the significance of size in calculating comparability. Two points are of special importance. First, in the school districts under review, OE did find a trend line indicating the effect of economies of scale. However, this factor appeared to be more significant in non-Title I than in Title I schools.

For example, in non-Title I schools the average number of pupils for each assigned certified classroom teacher increased from 21.7 (enrollment under 500) to 26.9 (enrollment 1500 or more). In this same enrollment range, Title I schools showed an appreciably smaller increase in the pupil/classroom teacher ratio, from 20.1 to 22.9.

The statistics also indicated that the differences were not as significant when, e.g., schools with less than 500 in enrollment were compared with schools with less than 1000.

The second point made in this study is that within the school districts, consistent with the national trend, a substantial number of Title I schools have larger enrollemnts thatn non-Title I schools. The report concluded that: "As a result, stratification by school size for the purposes of determining comparability could negate the intent of the comparability provision. For example, a small or medium size district after stratifying their schools by size could find that there were no non-Title I schools in higher enrollment ranges with which it could be used as a standard of comparison."

Elsewhere in the paper, the audit agency suggests that one alternative for taking into consideration economies of scale would be to include a weighted average mechanism to account for these variances. This option would recognize the existence of the economy of scale issue without allowing the LEAs to be exempt from the comparability requirement where non-project area schools are in a size group wherein Title I project area schools fall.

We understand that OE is considering a modification to the existing comparability regulations which provides that if, for a particular grade span, one school has an enrollment which is two times that of another, (excluding schools with 100 or fewer students) the LEA may divide the grade span into two groups. The LEA may divide the group at any point on the continuum. The purpose of this provision is to recognize the effect of school size. The following example illustrates how this section might operate.

Title I Schools		Non-Title I Schools	
800 -$300	800 -$300	400 -$800	750 -$600
800 -$300	800 -$300	750 -$600	750 -$600
800 -$300	800 -$300	750 -$600	750 -$600

750 enrollment is the cut-off point

In accordance with this proposed modification this school district would not be required to report comparability since it could set the cut off point at 750 once it can show that at least one school had an enrollment two times that of another.

The example illustrates the gross disparity in state and local funds in non-Title I versus Title I areas (two times the amount of state and local funds in non-participating schools than project area schools, that would be possible with a variation of as little as 50 students. Under this set of facts, it would seem critical that the discrimination against project area schools of almost equal size be prevented.

We conclude that the proposed modification operates in an capricious manner that is inconsistent with the Congressional purpose that services taken as a whole be comparable.

We strongly recommend that if economies of scale are to be taken into consideration that the OE proposal not be adopted. Under this proposal, (a) the school district can set the cut-off point any where on the continuum, rather than where size becomes a factor, and (b) if a size category does not have any non-Title I schools, the district is exempted from demonstrating comparability.

If economies of scale are deemed to be a legitimate factor, we recommend that OE consider the use of a weighting factor so that comparability will be required even if there are no Title I schools in the same size category as a non-Title I school.

One final point, in determining the weighting factor, OE researchers should consider why economies of scale appears to be more of a factor in non-project area schools than in project area schools in the school district described supra.

3. Weightings in School Finance Formulas

A second issue raised by several SEAs concerns the situation wherein the SEA in its weighting system provides additional funds for certain groups of children. One state explains that "in recognition of the fact that many learning problems can be prevented in later years by giving extra help to a child in his formative years," the State funds K-3 at a heavier weighting than other elementary school children.

In explaining the conflict between this policy and the existing comparability regulation, the SEA explains:

> "Under this provision, an LEA could not compare grades K-3 in Title I schools with comparable grade groupings in non-Title I schools, but would have to compare Title I elementary schools, whatever their grade groupings, with the average of other elementary schools. This does not allow us to recognize our heavier emphasis on grades K-3."

We recommend that a fourth grouping be allowed under these circumstances since the policy operates district-wide and is therefore not subject to the same kinds of problems hypothesized above under our discussion of school size.

E. Preparation By OE of Forms and Instructions

The existing regulations provide that the SEA must require each LEA, except as described *infra*., to submit a comparability report annually by December 1 containing the information necessary for the SEA to make the above determinations.[194] The Commissioner has prescribed the forms which each LEA must complete, demonstrating comparability.[195]

During the early years of comparability reporting, one of the most significant problems discovered by the HEW Audit Agency in a report on the review of the implementation of the comparability provisions was the lack of clear guidance and uniform forms.

> OE instructions necessary to provide the bridge between the legislation and its implementation was unclear and unspecific in the test year. As a result, SEAs supplemental guidance provided varied interpretations from state to state and was also unclear in many respects.

In accordance with existing regulations all LEAs now use prescribed forms and follow OE prepared instructions. As one SEA Title I Director stated "there is no question as to what is expected of us in this area. LEAs have grown to live with the annual comparability report."

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[194] 45 C.F.R. §116.26(b)(1974).

[195] *Id*. Program Directive No. L209-4 (August 28, 1975) provides, among other things, that the forms have been officially designated as OE 4524-A (formerly 4560) and OE 4524-B (formerly 4560-1).

Critical Dates

The following time-table of key events is set forth in the regulations:

November 1 of each year--the data required by the comparability report must be collected as of a date not later than November 1, as specified by the Commissioner.[196]

December 1 of each year--comparability report must be submitted to the SEA.[197]

January 1 of each year--SEA must submit to the Commissioner a report identifying each LEA that failed to meet the comparability requirements and indicating that each such LEA has allocated or reallocated sufficient resources to come into compliance[198] or that it is withholding the payment of Title I funds.[199]

March 31 of each year--the SEA must report to the Commissioner whether any non-complying LEAs have come into compliance, including revised comparability reports reflecting such compliance. If LEAs remain out of compliance as of this date, the SEA must finally disapprove such applications and the entitlements will be made available for reallocation to complying LEAs. [200]

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[196] 45 C.F.R. §116.26(b)(1974).

[197] *Id.*

[198] In those instances in which the LEA has reallocated sufficient resources and has submitted a revised comparability report to the SEA, the SEA must include such revised comparability reports in its January 1 submission to the Commissioner. 45 C.F.R. §116.26(k)(2)(1974).

[199] 45 C.F.R. §116.26(k)(1974).

Several states included in our survey explained that requiring LEAs to demonstrate comparability as of a date established by the Commissioner created problems. As one state explained:

> The stipulation that October 1, as determined by the Commissioner, be used for reporting "comparability" creates extreme problems because it is too early in the school year for staff adjustments to have been made. This date also occurs prior to the date the State... takes its FTE student counts which are the basis for budget allocations... .

Another state explained: "count-day" for state purposes did not coincide with the day determined by OE. The SEA made a request to OE that it be allowed to use its day. The request was granted.

We recommend that the regulations be modified to allow the SEA to use a day other than that selected by OE if the SEA uses a different day for its own purposes, provided that this date is as close to October 1 as possible and in no case later than October 31.

The earlier the date, the sooner the LEA can take action to remedy existing discriminations against Title I schools. In one state, for example, the SEA requests that LEAs submit their comparability reports within two weeks following the date set by OE (October 1) "so that LEAs will have time to make any necessary adjustments prior to December 1." The significance of this early determination of comparability is discussed infra.

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[200] 45 C.F.R. §116.26(k) (1974).

F. SEAs' Responsibility in Non-Complying LEAs

Based on the comparability report submitted by the LEA to the SEA (see infra.), if a school serving a project area is determined not to be comparable, "no further payments of Title I funds shall be made to the local educational agency until that agency has taken the action required by paragraph (k)(1) of this Section to overcome such lack of comparability." 201/

§116.26(k)(1) of Title 45 of the Code of Federal Regulations generally provide that the LEA must allocate or reallocate "sufficient additional resources to Title I project areas so as to come into compliance with such [comparability] requirements" 202/ and file a revised comparability report

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201/ 45 C.F.R. §116.26(c) (1974).

202/ 45 C.F.R. §116.26(k)(1)(1974).

reflecting such compliance.[203]

An issue that has developed in a number of States concerns the question whether a resolution by the school board may be accepted as evidence of action required by paragraph §116.26(k)(1), i.e., reallocation of sufficient additional resources?

A reading of existing paragraph §116.26(k)(1) indicates that such a resolution would not be acceptable, i.e., the teachers must actually be assigned as of December 1, the last date the comparability report may be submitted to the SEA. This is confirmed in a letter by OE to an SEA, in which OE explains that school board policy authorizing a reallocation of resources is not sufficient.

> A revised [comparability] report must indicate the date for which the data are being submitted. Only those instructional personnel who are actually employed and assigned to specific schools on that date are to be included in that report.

This letter also explained the date the LEA should use for purposes of preparing the revised comparability report.

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[203] *Id.*

> The use of enrollment data as of one date and data based on reallocation of instructional staff and salaries of such staff as of a later date would not demonstrate comparability as of either date. Consequently, all data used to demonstrate comparability and the maintenance thereof must be as of the same date.

Those states included in our survey, which explained how the operated under the above described circumstances, all acted consistent with OE's policy. As one SEA Title I Director put it, "the LEA must actually make the correction before December 1. It cannot simply put in its minutes prior to December 1 that it will reallocate funds as soon as possible."

The experience of a second SEA in its attempt to enforce the above quoted regulations and policy interpretations against a non-complying LEA is worth noting for two reasons. First, it points out that SEA Title I offices in some states are taking their oversight responsibilities seriously. Second, those SEAs which are willing to enforce the federal rules do not always receive the support from OE one might expect.

In brief, the facts of one situation were as follows. An LEA in the state, having prepared a comparability report discovered that the new staff would not be assigned to the Title I schools until December 16 pursuant to board action taken on November 26. (The regulation _supra_. requires reallocation by December 1). The SEA withheld funds between December 2 through the 16 for the reason that the additional personnel required were not hired and all did not report to work until December 16.

The LEA, unhappy with this decision, requested and was granted a hearing. The LEA contended that it had acted in good faith and was in "substantial compliance", i.e., "the dictates of the statute and regulation had been honestly performed in its material and substantial particulars and the only variance from the strict and literal performance consists of technical or unimportant ommisions or defects."

The SEA contended that the regulations did not, in this case, allow it to exercise any discretion concerning the date the actual suspension was to commence and the "substantial compliance" theory was not permitted by the regulations. They asked, "what if all of the necessary personnel are never in fact hired and placed on board? Can it still be said that comparability has been achieved?"

The hearing officer decided in favor of the LEA, and the decision was later substained by the Chief State School Officer.

Before we discuss the substantive issues presented by the above case, it is interesting to note the SEA's attitudes concerning the support, or in this case, the lack thereof, by OE. The persons we spoke with could not understand why OE had not provided support for their position. They stated, "if OE won't support us on this issue, then I'm sure they won't go out on the limb for us should we decide to withhold funds for violations of some other requirement which had not received the same attention as comparability."

The issue described above is one of several issues concerned with the "enforcement" section of the comparability requirement. The following analysis concerns the following two issues.

(1) Whether the comparability regulations should be amended to allow LEAs a reasonable period, possibly extending beyond the December 1 date, to reallocate funds pursuant to a board resolution passed prior to December 1?

(2) Whether the monies withheld during a period of suspension may be carried over to the next year to be used for Title I purposes?

With respect to the first issue, we recommend that the existing policy not be changed. It must be noted that any discrimination against project areas discovered in the middle of October and not remedied by December 1 has already been occuring since September 1, i.e., three months. The grace period between November 1 and December 1 would seem sufficient, and the issue will arise whatever date is set.

However, if during an SEA monitoring review it is discovered that the LEA, having once achieved comparability has failed to maintain it, (see infra.), the LEA should be given a reasonable period to correct its non-comparable status. In this case, the reasonable period should take into consideration the facts of the case.

Normally, a reasonable period would be considered the time period between the date of the finding and the next board meeting wherein an appropriate board resolution may be introduced and ratified.

With respect to the second question, we recommend, consistent with the policy pursued in several states, that the monies withheld be carried over to the subsequent year to be expended for Title I programs and projects. This policy would not result in any additional penalization to the children who were to receive benefits under Title I. During the interim period the LEA would be expending its own funds to operate the Title I program.

G. Maintenance of Comparability

By July 1 of each year, each LEA must file with the SEA an assurance that the comparability of services previously demonstrated will be maintained. For schools serving school attendance areas that will be designated project areas for the fiscal year beginning that July but were not so designated in the preceding fiscal year, the LEA must submit data showing that the schools would have been comparable during the preceding year if they had been designated project areas, or will, as a result of specific action by the LEA, be comparable during the fiscal year beginning that July 1.[204]

The maintenance of comparability provision was included in the regulations to prevent an LEA from reassigning teachers on the day the comparability determinations are made and then re-transferring these teachers back on the subsequent day.

In one state, one SEA Title I staff consultant tells the district he supervises that they should redo their comparability data each month. In a second state, the SEA requires that comparability data be updated at least every three months.

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[204] 45 C.F.R. §116.26(e)(1)(1974).

We recommend that each state develop a written policy defining the LEAs responsibility that it maintain its comparability status.

III. Application Forms, Monitoring and Recordkeeping

In marked contrast to many other areas of the Title I legal framework the SEA oversight of comparability requirements is spelled out in some detail in the federal regulations. For example, SEA application approval and payments are specifically tied to the filing of an LEA comparability report and LEA assurances as to maintenance of comparability in services and supplies.[205] LEA comparability reports must contain supportive data for each project school with over 100 pupils and, on a combined basis, for all other schools.[206] Additional reports and comparability data are required for schools found to be "non-comparable" by the SEA.[207] In terms of recordkeeping, LEAs must maintain, by individual schools, certain specified records and worksheets documenting maintenance of comparability and readily available for review.[208]

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[205] 45 C.F.R. §116.26(a) and (e).

[206] 45 C.F.R. §116.26(b) and (c); see discussion in Part I, A, *supra*.

[207] 45 C.F.R. §116.26(b) and (k).

[208] 45 C.F.R. §116 26(j).

Due to these specific requirements, SEA dictated practices concerning LEA comparability reports and record-keeping are substantially uniform. In addition, virtually all states surveyed required some level of LEA comparability in their application forms. However, both the detail of prescribed LEA assurances and the degree of SEA oversight of maintenance of comparability varied from state to state.

In this regard, therefore, we recommend three minor changes to existing regulations. First, the specific LEA assurances as to maintenance of comparability of services and supplies should be required in all LEA applications. Second, an assurance that required records are being maintained and are available for inspection should be added to presently mandated assurances. Finally, LEA applications should also describe how maintenance of comparability in these areas will be monitored and achieved, in order to focus LEA attention on the actual planning and logistics of comparability maintenance. This last recommendation is in keeping with the application practice of one state, which currently requires each LEA to have planned and published procedures to assure the maintenance of comparability.

To some extent, SEA monitoring of LEA comparability compliance is accomplished through the annual comparability report and comparability recordkeeping requirements. However, in and of themselves, these specific requirements are insufficient to address the constant monitoring required for "each function or activity of each grant" under federal regulations.[209] Thus, the SEA must also monitor comparability during the course of on site review.

The primary focus during on-site monitoring visits of the SEAs surveyed is the examination of comparability records and documentation. Some states have formalized this focus in their monitoring instruments. For example, one state monitoring form contains several inquiries based on federal regulations, as set out below.

1. Are all schools eligible and participating?
2. If not all targeted, was a complete comparability report submitted? If no, explain what was reported.

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[209] 45 C.F.R. §100(b)(431).

3. Are appropriate resource records being maintained, by individual schools, for the following items and do they support

   (a) records of children's enrollment
   (b) the total expenditure for salary and the amount based solely on longevity for each FTE instructional staff member and the prorated total salary less the amount based solely on longevity for each part-time instructional staff member
   (c) worksheets showing the total number of full-time and part-time instructional staff members

   (d) worksheets showing the total amount of State and local funds being expended for salaries for such full-time and part-time staff members less the total amount of such salaries based solely on longevity

   (e) the amount expended per pupil for textbooks, library resources, and other instructional materials and supplies actually available during the current school year

4. Are records and worksheets demonstrating the maintenance of comparability for the entire school year being filed, indexed and maintained so that they are readily available?

5. Do the records and school visits support the information reported on the comparability report (enrollment, salaries and other instructional costs)?

6. Were all the non-project schools placed in the correct grade span category in the comparability report?

7. Do resource records and individual school visits support the movement of enrolled pupils out of individual school or into non-project schools as reflected in the revised comparability report?

8. Do resource records and school visits support the corrective action statement describing the movement of instructional staff into individual project schools or out of non-project schools?

9. Do resource records and school visits support the corrective action statement describing the movement of the expenditures into individual project schools or out of non-project schools?

10. Do resource records and school visits support the projected other instructional costs in the revised comparability report?

11. List the items in this section in which the LEA needs assistance and/or improvement and comment on those items which need further clarification.

However, it appears that in many instances, SEA review of comparability data does not extend beyond the examination of LEA records and, in some cases, on site visits to project schools. Thus, the most extensive SEA monitoring of project schools generally involves a comparison between LEA records and the comparability report and a comparison between project school records and LEA records. LEA records concerning non-project schools are not independently verified through on site visits to non-project schools.

Under this approach to monitoring, comparability cannot be adequately assessed, since data concerning those non-project schools which provide the standard or measure of comparison (and additionally in some cases, data concerning project schools) are not verified beyond the level of LEA records. In order to remedy this situation and permit more effective SEA monitoring, particularly as to maintenance of comparability, we recommend one regulatory amendment.

We recommend that SEAs be required to monitor a reasonable number of non-project as well as project area schools in order to determine (a) the accuracy of the figures set forth in the comparability report and (b) whether comparability is being maintained.

CHAPTER 11

ORDINARILY PROVIDED

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CHAPTER 11
ORDINARILY PROVIDED PROVISION

I. Introduction

A. Overview of the Federal Legal Framework

The two preceding chapters of the paper described and analyzed the central aspects of the supplement not supplant and comparability provisions. With respect to the supplement not supplant provision, Chapter 9 explained, among other things, that there are two concepts which must be understood.

First, the existence of Title I funds may not be taken into consideration when the school district and the schools within the district distributes state and local funds. Thus, the supplement not supplant regulations provide that the use of grant funds may not result in a decrease in the level of state and local funds that "would be made available" for the education of program participants but for the existence of Title I funds and neither a project area or educationally deprived children residing therein may otherwise be "penalized" in the application of state and local funds because of the existence of Title I funds.

Second, the federal legal framework explains that in no case may Title I funds supplant or replace the level of state and local funds that would be made available but for the existence of Title I.

In sum, it is a violation of the supplement not supplant provision if the LEA penalizes the project area or the educationally deprived children in the distribution of State and local funds because of the existence of Title I or uses Title I funds to replace the state and local funds that would have been provided but for the existence of Title I.

With respect to the comparability provision, the regulations prescribe the minimum level of services paid for with state and local funds that must be provided in each project area school before any Title I program may be provided. Thus, "services, taken as a whole" which are provided in non-project areas with state and local funds, must be provided, at a minimum, on a comparable basis in project areas.

Although both of these provisions implement the statutory mandate included in the Congressional Declaration of Policy that Title I programs be designed to meet the "special" educational needs of educationally deprived children (see supra.),it is evident that there is a difference in focus between the two provisions.

The supplanting provision directs LEAs not to take into consideration the existence of Title I in the distribution of State and local funds. The key question is what level of funds would be provided but for the existence of Title I.

The comparability provision prescribes directly the level of services paid for out of state and local funds which must be provided. The existence of Title I funds, as the reason for the discrimination, is not relevant to the demonstration of comparability by the LEA.

Thus, for example, a pre-existing inequality between project and non-project area schools in the pupil to teacher ratio would not violate the supplement, not supplant, provision because the inequality pre-dated the existence of Title I funds and therefore could not have been a factor precipitating the discrimination. However, the comparability regulation requires that a lack of comparability with respect to the teacher-pupil ratio must be eliminated before the SEA may finally approve a Title I application, even though the inequality pre-dated the existence of Title I. The comparability provision is directed at fostering appropriate equality in the distribution of services and not with the cause of such inequity.

The existing federal legal framework includes a third provision further implementing and clarifying the Congressional mandate that Title I programs be used to meet the "special" educational needs of educationally deprived children. This provision is commonly referred to as the "ordinarily provided" provision.[210]

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[210] As explained infra, the "ordinarily provided" provision has been construed as a test for supplanting, complementing the curtailment, pre-existing commitment and intra-school supplanting tests discussed supra, in Chapter 9.

The existing regulation provides (45 C.F.R. §116.17(h)(3)(1974)):

> No project under Title I of the Act will be deemed to have been designed to meet the special educational needs of educationally deprived children unless the federal funds made available for that project . . . (3) will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with state and local funds to children in non-project area schools.

The "ordinarily provided" provision is a hybrid, clarifying aspects of the supplanting provision referred to above as well as implementing aspects of the statutory comparability requirement not otherwise covered by the comparability ratios.

The ordinarily provided provision, like the comparability provision, (a) compares services provided in project areas with services provided in non-project areas and (b) prescribes directly the level of services paid for out of state and local funds which must be provided before the LEA may use Title I funds in project areas.

However, the ordinarily provided provision is dissimilar to the comparability provision in several important respects. First, unlike the comparability provision which is only concerned that each project area receive its fair share of services, the ordinarily provided provision, like the supplement, not supplant provision, ensures that program participants residing in the project areas are receiving a fair share of services paid for with State and local funds. The two provisions accomplish this common objective by employing different standards of comparison. Under the supplanting provision the LEA must demonstrate that program participants, as compared with children not participating in the program who attend the project area school are receiving a fair share of services paid for from state and local funds. Under the ordinarily provided provision the comparison is between program participants attending project area schools and children attending non-project area schools.

Second, the ordinarily provided provision prohibits discrimination against project areas with respect to the distribution of services not covered by the comparability requirement, e.g., transportation, kingergarten, and maintenance.

Finally, unlike the comparability provision which requires that certain specified services must be provided before any Title I funds may be expended in project areas regardless of whether or not the Title I program includes the provision of similar services the ordinarily provided provision only requires the equitable distribution of specific services which an LEA is proposing to pay for out of Title I funds; i.e., before an LEA expends Title I funds for a specific service, it must demonstrate that the same service is not ordinarily provided in non-project areas with state and local funds.

B. Purposes and Organization of This Chapter

This chapter of the paper will (a) trace the development of the provision including its rationale, prior phraseology, and Congressional recognition, (b) analyze the application of the provision, including a discussion explaining the interrelationship between this provision and the excess costs provision, the supplanting provision and the comparability provision, (c) analyze the clarity of the provision, including an analysis of state interpretations, and (d) make policy recommendations.

C. Major Issues, Conclusions and Recommendations

We have concluded that the basic purpose and rationale of the "ordinarily provided" provision are sound. However, the precise meaning and scope of the provision was not always clear to many of the SEAs included in our survey. We have concluded that this confusion results, in part, from OE's attempt to carry several concepts in a one sentence regulation , and from OE's failure to widely disseminate its interpretations of this single sentence to SEAs and LEAs. To eliminate this confusion, we recommend that three separate sections be included in the federal regulations. This recommendation is primarily a clarification of existing OE policies set forth in OE correspondence with SEAs.

First, with respect to (a) state and local compensatory education programs similar to Title I and (b) programs which expand the level of instructional services offered in the school district, e.g., adding kindergartens or increasing the length of the school day, such programs must be equitably distributed according to objective criteria in project as well as non-project area schools. A failure to equitably distribute such programs would be construed as a penalization of the educationally deprived children children residing in project areas. In no case would it be acceptable to use Title I funds to supplant the state and local funds which would have been provided but for the existence of Title I.

Second, Title I funds may not be used to provide services which an LEA provides to all schools pursuant to state law, school board policy or practice, or court decree. If in derogation of state law, school board policy or practice the LEA provides such services to some but not all schools, such services must be provided, at a minimum, on an equitable basis to project area schools.

Finally, Title I funds may not be used to pay for services which were provided in non-project area schools with state and local funds, but which are not provided on an equitable basis to project area schools, e.g., maintenance, summer school, bus transportation, and with respect to pre-existing inequities in the distribution of services.[211]

Set forth below are two additional issues addressed in this paper and our conclusions respecting each issue.

(1) If a particular service is provided at some but not all non-project area schools, is that service ordinarily provided and if so what is the consequence?

This regulation has been interpreted by OE to require that where some but not all project areas receive a certain service, that service must be provided on an equitable basis. We agree and recommend, therefore, that the term "ordinarily provided" be replaced with the phrase "provided on an equitable basis".

(2) Should the provision, that "services" ordinarily provided in non-project area schools with state and local funds may not be paid for in project areas with Title I funds be interpreted with reference to general categories of services (e.g., if reading is paid for with state and local funds in non-project areas and Title I funds may not be used to pay for a reading program in project areas) or should the phrase be interpreted to apply to the level of services (e.g.,

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[211] Recall that pre-existing inequities are not prohibited under the supplement not supplant provision, since the inequities were not occasioned because of the existence of Title I; but are prohibited under the comparability section of the statute which is not concerned with the cause of the inequities.

in non-project areas reading is provided with state and local funds one period per week) to which the excess costs concept is applied?

We have concluded, consistent with the excess costs concept (see supra.) and with the OE informal legal framework that the term "services" should be interpreted to mean level of services. Therefore, if the LEA provides reading instruction in a project area school one period of the week for all children, including children participating in Title I programs, Title I in a project area school one period of the week, Title I funds may be used to supplement the program by providing reading for project participants the remaining four periods per week, i.e., Title I may pay for the excess costs. Note that, in accordance with our analysis, supra., concerning the aspects of the supplanting provision restricting discrimination against project participants, the reading program provided one period a day with state and local funds must be provided on an equal basis to project participants as well as non-participants.

Our recommendations reflect the above conclusions.

II. The Historical Development and Purpose of the "Ordinarily Provided" Provision

A. Historical Development of the "Ordinarily Provided" Language

The "ordinarily provided" language (see supra.) was added to the Title I regulations on October 14, 1971, the same day OE amended the Title I regulations by adding the comparability regulation. However, the concept that educationally deprived children residing in project areas may not be penalized in the provision of services generally provided in non-project areas with state and local funds and that Title I funds may not be used for programs ordinarily provided and paid for in non-Title I areas with State and local funds, has been in existence in the Title I regulations and guidelines since 1968. Set forth below is a chronological accounting of the phraseology implementing the concept.

Section 7.1 of Program Guide # 44, issued on March 18, 1968 provided that, "It is expected that services provided in the district with state and local funds will be made available to all attendance areas . . . without discrimination." The guidelines defined the term "services" to mean, among other things, the "number and variety of personnel."

Program Guide #45, issued on June 14, 1968 reiterated the above language and warned against the "penalization" of Title I project areas by ". . . continuing patterns of discrimination against project areas."

§116.17(h) of Title 45 of the Code of Federal Regulations was amended on November 28, 1968 to provide, in relevant part that:

> "neither the project area nor the educationally deprived children residing therein will otherwise be penalized in the application of state and local funds because of such a use of funds under Title I of the Act. For purposes of this paragraph, the failure to use state and local funds to provide to a project area . . . services comparable to those services which have been or are to be generally provided to other areas . . . will be deemed to constitute a penalization of that project area . . ."

Program Guide No. 45A issued on July 31, 1969 stated that "in reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of Title I requirements: *** the applicant is proposing to use Title I funds to provide in the project areas services that are already being provided or that will be provided in the non-project areas with state and local funds."

The term "services" was defined to include ratios of (a) pupils to teacher, (b) pupils to other professional staff, and (c) pupil to non-professional staff. In addition, the guideline required comparability of services, "in terms of variety, scope and degree of participation of special services provided with state and local funds" in non-Title I areas.

The program guide continues, explaining that such a policy is an indication of a violation by stating that "any applicant that insists on entering a proposal fitting the description [in 5] above must assume the burden of proof that the proposal does not involve the supplanting of State and local funds."

On February 26, 1970, OE issued Program Guide # 57 which superseded the above program guides. For the first time, OE used the term "comparability" generically to include (a) the supplanting concept which generally prohibits the penalization of project areas because of the existence of Title I and the use of Title I to supplant funds which would have been provided but for the existence of Title I and , (b) the comparability concept that a certain base level of services paid for from state and local sources must be provided in Title I areas comparable to the base provided in non-Title I areas. The guideline explains:

> Services that are already available or that will be made available to children in the non-project areas must be provided on at least an equal basis in the project areas with state and local funds rather than with Title I funds.

This guideline issued by OE required the submission of a report demonstrating comparability.

In general, the criteria for demonstrating "comparability" included a series of ratios similar to ratios eventually adopted by OE in its official regulations added in 1971. The LEA was required to demonstrate comparability in the provision of basic programs before a Title I application could be approved. In addition, OE required in the report a certification:

> that the specific Title I funded service does not simply match services already being provided in non-project schools. In so doing, the local educational agency shall describe the services (of the type applied for) already

> provided by state and local funds in project and non-project schools. For example, if a local educational agency requests Title I funds to finance a food service program in a project area school, it shall provide comparative data on the provision of food services to that school and to non-project area schools before the addition of Title I funds to the project area school.

In sum, Program Guide # 57 included at least two standards concerning the provision of services in a non-discriminatory manner. With respect to quantifiable indicators of services, e.g., the number of students per teacher, the LEA was required to demonstrate compliance with this objective standard before a Title I project could be approved.

With respect to the variety of services and courses available, the guideline provided first, that services provided to children in non-project areas must be provided on an equal basis to the project area schools, and second, that in the "comparability report" the LEA must certify, before Title I funds are used for a particular program, that such a program is not already provided in non-project area schools with state and local funds.

Several months after the issuance of Program Guide # 57, Congress amended the Title I statute by including a supplanting provision and a comparability provision. In so doing, the legislative history indicated a general approval of Program

Guide # 57.[212] Moreover, the legislative history indicated concurrence with the necessity of demonstrating non-discrimination not only in terms of ratios (as presently covered by the comparability regulations), but also in terms of available courses and services.

> ". . . In enforcing clauses (B) [supplanting] and (C) [comparability] . . ., the Commissioner is expected to look to the services available to children in Title I projects compared with services available to children outside project areas and hold state and local educational agencies responsible for determining comparability of services and expenditures, and emphasize substantial equivalence in such matters as pupil-staff ratios, available courses and services, and average teacher compensation." (emphasis added)[213]

OE has chosen to implement the Congressional mandate by promulgating the "ordinarily provided" regulation.

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[212] See supra. at p. 576.

[213] Senate Report No. 91-634, 1970 U.S. Code Cong. and Adm. News 2782.

B. Purpose of the "Ordinarily" Provided Regulations

1. Introduction

Set forth below is an explanation of why the "ordinarily provided" provision is included in the formal legal framework.

2. General Statement of Purpose

A clear statement of the specific intent of this provision is contained in a memorandum written prior to the enactment of the supplanting and comparability provisions from Robert Mardian, then General Counsel, HEW, to Commissioner of Education Bell. Recall that the language of the regulations then in existence was "generally provided" rather than "ordinarily provided".

> . . . Congress did not intend Title I to embrace the provision of general services at target area schools, even if such services had not previously been provided there, if such services were generally provided by the LEA at non-target area schools . . .
>
> If an LEA provides a given instructional or auxiliary service on some general basis to children within its district who are not educationally deprived (whether or not it also provides such service to educationally deprived children) the service cannot fairly be understood to be one designed to meet the "special educational needs" of children who are educationally deprived. By generally offering the service to non-target area children, the LEA has by its own terms characterized it as one designed to meet a general educational need.

3. Specific Examples of Violations Which the Provision Guards Against

Set forth below are several specific examples[214] illustrating the meaning of the "ordinarily provided" provision. The examples are taken from the Mardian memorandum cited above and from OE correspondence.

The first example included in the Mardian memorandum is an extreme case included to illustrate the purpose of the provision.

> To take an extreme case, let us assume that an LEA whose program includes secondary education has, possibly in derogation of state law, never afforded a meaningful opportunity to farm children from a given rural target area to obtain those educational services. Even though a Title I project designed to construct a high school, employ regular teachers, and institute a program of secondary education for these children would not supplant prior state and local effort, it would nevertheless never be approvable. This is because the project would provide general services which the LEA customarily provides to other children within the school district to meet their general need for education, and thus could not be said, to be designed to meet the 'special' educational need for the farm children.

Less extreme examples than the failure to construct a high school of the type generally provided in non-project areas which are prohibited under the "ordinarily provided" provision are set forth below.

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[214] These examples assume that a LEA is unable to satisfy its burden of proof (see supra,) that although children in project areas are not receiving services ordinarily provided in non-project areas, they are receiving "extra" services not otherwise provided in non-project areas.

Assume that the LEA distributes maintenance funds in the amount of $1,400 per teacher to all non-project area schools. Assume further that such level of support had never been provided to project area schools, i.e., they only received $1,000. The "ordinarily provided" provision would prohibit the use of Title I funds to make up for this discrimination. Note, however, that the language of this provision does not require that the LEA distribute funds for maintenance on an equal basis.

Assume that a school district has recently undergone desegregation and as a result children in Title I project schools as well as in non-project area schools must be bussed. The "ordinarily provided" provision would prohibit the use of Title I funds to bus the educationally deprived children in project areas because bus transportation is "ordinarily provided" with state and local funds in non-project area schools, i.e., it is required by the school board policy or practice.

Assume that a school district provides summer school courses in, e.g., English as a second language. The "ordinarily provided" provision would prohibit the use of Title I funds to pay for such a course if the course is "ordinarily provided" in non-project area schools with state and local funds.

Assume that a school district offers kindergarten in non-project area elementary schools. The "ordinarily provided" provision would prohibit the use of Title I funds to pay for kindergartens for educationally deprived children residing in the project area schools since kindergarten is "ordinarily provided" in non-project area schools with state and local funds.

In correspondence with various LEAs and SEAs, OE has explained how the "ordinarily provided" provision operates when there is only sufficient state and local funds to pay for kindergartens for some but not all children in the district. This explanation appears infra. at p. 656.

Assume that a school district has built with state and local funds a reading center servicing the entire school district. In a given year, the LEA decises to expand the remedial reading program by funding remedial reading teachers on a half-time basis at each elementary school in non-project area schools.[215/] The "ordinarily provided" provision would prohibit the use of Title I funds to pay for such half-time remedial reading teachers in project area schools since such teachers are "ordinarily provided" in non-project area

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[215/] For purposes of this example, assume that each school in the district has the same number of children.

schools with state and local funds.

In correspondence with SEAs, OE has explained how the "ordinarily provided" provision would operate where the LEA does not have sufficient funds to provide half-time remedial reading programs in all district schools; this explanation appears infra., at p. 655.

The United States District Court in the Eastern District of Pennsylvania in a case entitled, Nicholson v. Pittenger, 364 F. Supp. 669 (1973), one of the few reported cases concerning Title I, interpreted the "ordinarily provided" provision and the relevant aspects of Section 7.1 of Program Guide No. 44.

The court, in construing the "ordinarily provided" provision as a type of "supplanting", made the following findings:

> Despite these statutory and regulatory prohibitions against supplanting, defendants have not required the District of Philadelphia to submit the information necessary to make a determination as to the existence or absence of supplanting. For example, defendants have not required Philadelphia to submit lists of educational programs provided in non-Title I schools, nor have defendants required Philadelphia to submit lists of employees and job descriptions of employees who work in non-Title I schools. Therefore, defendants have no way to determine whether or not Title I programs in Title I schools are similar to non-Title I programs in non-Title I schools or whether or not non-Title I employees perform the same jobs as Title I employees. (at 674).

The Court then found, based on evidence offered by the plaintiff that:

> . . . there has been supplanting in Title I financed art, music and reading programs in Title I schools, which are also provided without Title I funds in non-Title I schools. Similarly, art teachers, teaching aides, music teachers, and reading teachers paid with Title I funds perform the same functions as their counterparts in non-Title I schools who are paid with state and local funds.

III. Standards for Determining When a Service is "Ordinarily Provided" and the Significance of Such a Finding

A. Introduction

The previous subsections explained the purpose of the "ordinarily provided" provision to prohibit discrimination by LEAs in the provision of state and local funds for services ordinarily provided in non-project area schools, and the various approaches used by OE for addressing the discrimination. Set forth below is an analysis of the federal and state standards used for determining whether a service is "ordinarily provided" and the significance of such a finding.

B. Federal Legal Framework

1. Introduction

On several occasions, OE has interpreted the meaning of the "ordinarily provided" regulation in correspondence with LEAs and SEAs.

2. Remedial Services Provided to Some but Not All Schools

In one letter, OE was asked whether or not a newly formed district (two districts which had merged) would be permitted to provide remedial reading services under Title I if such services are also provided through state and local funds in some but not all schools.

In response to this query, OE explained:

> First of all, the local educational agency for the newly organized school district should determine how and to what degree various educational services should be provided in the schools of the district. Any such service which cannot be provided for all children must, however, be equitably distributed in Title I and non-Title I areas before the local educational agency may consider replicating that service with Title I funds (if it meets Title I criteria) or supplementing that service with Title I funded services. The distribution of such a service to children in Title I and non-Title I areas must be in proportion to the number of children in those areas who qualify for that service according to objective criteria.
>
> Under the foregoing conditions, the local educational agency could use Title I funds to provide similar services in Title I areas that cannot be reached by the state and locally funded program or to supplement such programs in ways that meet Title I criteria. In the event that more state and local funds become available for such service the principle of proportionality in the distribution of such services among children in Title I and non-Title I areas would have to be maintained.

In sum, OE explained that where a special service is provided to some but not all children in a school district because of limited state and local resources, that service must be equitably distributed to all schools without regard to the availability of Title I funds in project area schools to provide such services.

3. Phase-Out of Title I Program and Phase-In of State and Locally Supported Program

In a second letter, an SEA sought guidance from OE concerning the phasing out of kindergarten services provided under Title I and the phasing in of kindergarten services with State and local funds. In response to this question, OE explained:

> If the State-funded kindergarten services are provided equitably to children in Title I and non-Title I areas then Title I funds may be used to provide additional kindergarten services for children who are not yet being served by the State-funded program. Each year, of course, the number of such children would diminish as the State-funded program continued to expand on an equitable basis into both Title I and non-Title I areas.
>
> The number of classes and the number of children being served by the State-funded kindergarten program should be divided among Title I and non-Title I areas in approximately the same proportion as the number of kindergarten children in those respective areas. For example, if 50 percent of the kindergarten age children reside in Title I areas then at least 50 percent of children to be served in State-funded kindergarten should be from Title I areas.

In sum, OE has recently construed the "ordinarily provided" regulation to incorporate the concept of equitable distribution of services paid for with state and local funds according to some objective criteria developed by the SEA or LEA. In the case of the kindergarten phase-in, the objective criterion is the proportion of children in Title I versus non-Title I attendance areas.

The applicability of the excess cost concept is implicit in these OE policy pronouncements concerning the "ordinarily provided" provision. Set forth below is an example illustrating the application of the excess costs concept.

Let us assume that in the phase-in situation, 50 percent of the educationally deprived children in Title I schools received state and local funds to support the kindergarten program for one-half a day, two days per week. Title I funds may be used to pay for the excess costs of programs (see supra. at p. 456), which in this case are the costs of supporting the kindergarten program in the remaining Title I schools two days per week.

Now assume that instead of expanding the kindergarten program to other Title I schools lacking kindergartens, the LEA decided to provide a five day a week kindergarten program for educationally deprived children in those Title I schools receiving state and local support (instead of 2 days). Title I, under the excess costs concept could pay for the three additional days for those children who are educationally deprived.

Similarly, if a remedial reading teacher provided with state and local funds is available in each school one-half day, five days a week, Title I funds could be used to pay for the reading teacher for the one-half day, bringing the total time at the Title I school to an entire day, five days per week so long as: (a) the reading teacher is hired as part of a well-designed program, (b) the children participating in the Title I program are not discriminated against in the provision of services generally offered by the remedial reading teacher during the period the teacher is paid for out of state and local funds, and (c) during the time paid out of the Title I funds, the remedial reading teacher works only with children participating in Title I programs.

In each of these hypotheticals described above, we have concluded that OE would construe the service which is "ordinarily provided" to mean the level of support rather than focusing on the type of service provided. Thus, e.g., the service which is "ordinarily provided" is not remedial reading *per se*, but rather remedial reading for one-half a day, five days a week. The provision of remedial reading for a period beyond that one-half day could therefore be a legitimate Title I expense.

4. Experimental Programs

Although we were not able to review any OE correspondence concerning the status of experimental programs with respect to the "ordinarily provided" regulation, the internal memorandum quoted supra., written by the DHEW General Counsel, concluded:

> We would see no bar under this analysis to the use of Title I funds for programs or projects to meet needs that an LEA is meeting with state and local funds at selected schools on a demonstration or experimental basis.

C. State Legal Framework

The state policies and interpretations concerning the meaning and scope of the "ordinarily provided" regulation varied considerably. In general the notion that this provision merely requires that the LEA treat project and non-project areas on the same basis, rather than requiring that LEAs more favorably treat project areas, was not understood.

Thus, for example, several SEAs explained that where more than fifty percent of the non-project area schools received a certain service, Title I funds could not be used in any of the project area schools unless it is provided in all project area schools with State and local funds. The notion of providing State and local funds for a particular service "on the same basis" was not recognized. These SEAs did not recognize the notion of proportionality in the distribution of state and local funds when the LEA is phasing in a program formerly funded under Title I.

Furthermore, several SEAs did not look at the level of services provided with State and local funds but simply the type or kind. Thus, for example, several SEAs explained that if remedial reading were offered in some non-project area schools, remedial reading could not be provided in project area schools with Title I funds.

Based on a review of OE policy as described above, these policies are overly restrictive and inconsistent with federal policy. These SEA policies unnecessarily restrict local options and local maneuverability in the development of district-wide plans. Title I simply requires equitable distribution of resources and services, not favoritism.

On the other hand, several states have developed non-restrictive policies which are consistent with OE policy. In one state the SEA, in its policy manual, includes the following interpretations:

> A district has the same obligation to the Title I area as to the non-Title I area, instructional or auxiliary services provided a non-Title I area must be provided for the Title I area and the only instruction or service Title I can fund are those that are additional".

> "A program or service provided in a non-Title I area at state and/or local expense must be provided to the same degree by state and/or local funds in the Title I area. Title I can then provide additions to the program or service in the Title I area for the Title I children. Example: A district provides a remedial reading teacher or teachers in a non-Title I area. The district must provide the same remedial reading teacher-pupil ratio in each of the Title I areas. Title I can then provide additional remedial reading teachers in the Title I areas above that teacher-pupil ratio.

Although the SEA interpretations varied considerably concerning the meaning and application of the "ordinarily provided" regulation, most SEAs agree that if State law , or official School Board policy mandate that a particular service be provided at a particular level, e.g., one remedial reading teacher, art teacher, music teacher per school, Title I funds may not be used to pay for the teacher's salary in project area schools.

Most of the SEAs agree that an experimental program in one or two schools should not be considered to be "ordinarily provided," although several SEAs explained that it was often difficult to determine whether or not a particular program was experimental.

IV. General Policy Analysis and Recommendations

A. Introduction

The fundamental purpose of the "ordinarily provided" regulation is to ensure that Title I funds are used to meet the "special" educational needs of educationally deprived children residing in project areas. Operationally, this general purpose is accomplished by prohibiting school districts from using Title I funds in project areas to pay for services ordinarily provided to children in non-project area schools with State and local funds.

The basic rationale for this provision is that if a school district ordinarily provides a given instructional or auxiliary service to children residing in non-project areas, the service cannot fairly be understood to be one designed to meet the special educational needs of educationally deprived children residing in project areas. Such a service must be provided in project areas on the same basis as it is provided in non-project areas, i.e., the school district must expend its own funds rather than Title I funds, to provide the service.

Conceptually, the key question to ask then is which funding source must be used to pay for a given service, State and local or Title I?

We have concluded that the rationale and purpose of the existing "ordinarily provided" regulation is sound.

However, we have concluded that the existing phraseology has not sufficiently informed many of those responsible for action as to its scope and meaning. Many SEAs included in our survey pursued overly restrictive policies not mandated by the federal legal framework.

Our proposed amendments reflect the federal informal legal framework and are based, in part, on prior OE statements of policy set forth in program directives. In short, we are primarily clarifying existing policies rather than creating new ones.

However, before we set forth our recommendations, it is important to describe the important aspects of the existing provision, some of which are not always clearly understood.

B. The Meaning and Scope of the Existing Ordinarily Provided Regulation

There are several aspects of the "ordinarily provided" regulation which the reader must understand.

The first aspect of the regulation concerns the meaning of the phrase "ordinarily provided". Although many SEAs attempted to define the phrase in terms of the number of non-project area schools offering a particular service, OE has primarily focused on the distribution process, rather than the number of schools offering a service, i.e., given that a particular service or program is provided in some but not all the non-project area schools, is that service or program provided on an equitable basis in project area schools?

For example, assume that an LEA wants to start a new remedial reading program paid for out of state and local funds. Assume further that the LEA plans to phase-in the program, lacking sufficient funds to serve all children in all schools within the district. The LEA may pursue a phase-in policy without acting in contravention of the Title I legal framework so long as the funds supporting this program are equitably distributed without regard to the existence of Title I.

The second aspect of the regulation concerns the meaning of the word "service" in the phrase "services in project area schools that are ordinarily provided with State and local funds to children in non-project area schools." The informal legal framework explains that the word "service" should be interpreted consistent with the excess cost provision.

Specifically, it is incorrect simply to determine that in non-project area schools remedial reading teachers are provided, and therefore in project areas the entire remedial reading program must be paid for out of state and local funds. Rather, the school district must provide the service in project areas at the same level it is being provided in non-project areas.

For example, if the children in the non-project area receive remedial reading once a week, the school district must provide remedial reading with state and local funds on the same basis, i.e., once a week. The LEA may then use Title I funds to pay for a remedial reading program for eligible children for the remaining four days (one period per day) with Title I funds, i.e., Title I funds may be used to pay for the excess costs of a program.

The third aspect of the ordinarily provided regulation also concerns the meaning of the term "service". There are several categories of services provided by an LEA. The first category includes services which an LEA is required to provide pursuant to, for example, state law, Title VI of the Civil Rights Act, or a school board policy or practice. We have concluded that a service which an LEA is required to provide in accordance with such policy pronouncements or directives may not be provided with Title I funds since the LEA must provide the service to all children, regardless of whether they are educationally deprived or reside in project areas.[216]

"Services" which an LEA provides in accordance with an official policy pronouncement or directive include, for example, maintenance costs, bus transportation, summer school, kindergarten classes, the length of the school day, and compensatory education programs.

To the extent these "services" are presently not being provided on an equitable basis to project area schools, and such discriminatory actions by the LEA did not pre-exist Title I, a presumptive indication exists that the LEA has acted in derogation of the "supplement, not supplant" provision by penalizing children participating in Title I programs in the distribution of state and local funds. The rules governing this provision were described supra. in Chapter 9.

To the extent that the LEA has always penalized "project area" schools, such practices, although they might not be considered to violate the "supplement, not supplant" provision (recall that under these provisions there is a violation only if the penalization resulted because of the existence of Title I, and here the discrimination pre-dated Title I, and thus cannot be considered to have been due to the existence of Title I) would nonetheless be considered contrary to the Congressional intent that Title I funds be used to meet the "special" educational needs of educationally deprived children residing in low-income areas. These practices would also be inconsistent with the comparability concept that, regardless of the reason for the discrimination, if an inequity exists it must be eliminated to preserve the specialness of Title I. For example, because educationally deprived children attending project area schools have always been discriminated against in the level of support for bus transportation or summer school classes offered (pre-existing inequity) should not be a justification for allowing the discrimination to continue, given the Congressional mandate that Title I be used for "special" programs, rather than for programs generally provided to other areas with state and local funds.

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[216] It should be noted that the March 11, 1975 proposed regulations prohibit, among other things, the use of Title I funds to pay for services which an LEA is required to provide pursuant to state law or a formal determination under Title VI. However, no mention is made of a service which an LEA must provide to each school pursuant to board policy.

C. Recommendations

Based on our preceding analysis, we recommend that

Section 116.40(b) of the proposed regulation (40 F.R. 11476, March 11, 1975) be modified to include the underlined words:

> The use of Title I funds to provide the level of services which the applicant agency is required to provide in accordance with the following legal mandates shall constitute a presumptive indication that the LEA has violated §116.40(a): state law, LEA policy or practice, or pursuant to a formal determination under Title VII of the Civil Rights Act, Title IX of the Education Amendments of 1972 (Pub. L. 92-318), or Section 504 of the Vocational Rehabilitation Act of 1973, as amended, or pursuant to a final order of a court, except where such court order mandates the expenditure of Title I funds in accordance with Title I requirements.

The effect of this modification is straightforward. If the policy of the LEA is to distribute types of teachers, (e.g., reading, art, music, etc.) according to a formula, (e.g., one reading teacher per school), the use of Title I funds is a presumptive indication that a supplanting violation has occurred (see Chapter 9).

Second, we recommend that the "ordinarily provided" language be deleted, and in its place the following language be added:

> To ensure that Title I funded instructional and auxiliary services do not simply provide the same level of state and locally funded auxiliary and instructional services that were previously made available and presently are made available to children attending non-project area schools, that level of services must be provided on an

> equitable basis to children attending project area schools. Under no circumstances shall Title I funds be used to provide that level of services.

This proposed regulation attempts to restate and clarify the following points:

(1) The addition of the phrase, "on an equitable basis" clearly indicates that if some, but not all the non-project area schools receive a service, it is not required that all Title I schools receive that service before Title I funds can be used to provide a similar service. What is required is a proportional distribution of the available state and local funds.

(2) This provision operates only to prohibit the use of Title I funds to match services which were made available in the past or are presently made available to non-project areas with state and local funds. If the Title I project does not require the expenditure of Title I funds for a similar service, provided in non-project areas with state and local funds, such services need not be equitably provided pursuant to this regulation.[217]

(3) The regulation adds the term "level" of services to indicate that one must look beyond the type of service, e.g., remedial reading to the level of service, e.g., one period a week. This change recognizes that Title I funds may only

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217/ However, it should be noted that if the LEA curtails the provision of a particular service formerly funded with state and local funds, such an action would indicate that the project area has been penalized.

be used to pay for the excess costs of a program. Thus, a project area school may supplement the once a week program with a Title I funded program for the remaining four days, assuming that the Title I funded program meets all Title I requirements and the project participants are not being discriminated against in the provision of the state and locally funded reading teacher.

The final recommendation concerns the situation wherein the state or school district develops a compensatory education program which may be excluded for comparability purposes.[218] We recommend that the regulations be clarified by an amendment which would provide that notwithstanding the supplement, not supplant requirement an LEA, at its option, may take into consideration the existence of Title I funds in distributing SCE funds, provided that (a) educationally deprived children residing in low-income areas who are or would have been considered program participants under Title I, but for the existence of the SCE program, receive the same nature and scope of services under the SCE program as would otherwise have been provided under Title I and (b) educationally deprived children residing in low-income areas, taken as a whole, receive their fair share of SCE funds according to objective criteria.[219]

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[218] See Section 403(17) of P.L. 81-874.

[219] The rationale for the language in the proposed regulation eligible areas "taken as a whole" is discussed in detail in a separate paper entitled: A Description and Analysis

V. Application Form, Monitoring Instrument and Recordkeeping Requirements

Oversight of the "ordinarily provided" provision is generally accomplished in the Title I legal framework through the application approval, monitoring, and recordkeeping processes. Set forth below is an analysis of state policies and our recommendations.

Most states surveyed require only minimal application information relating to the ordinarily provided provision. In many cases, the LEA application merely contains an assurance that Title I funds are used to supplement and not supplant state and local funds with no specific reference to the "ordinarily provided" provision. Assurances of this sort are the minimum application requirements under 45 C.F.R. §116.17(h).

A few states have initiated a more detailed approach at the application level. For example, one state requires the filing of an additional "classification report" containing both Title I and non-Title I staff information, which is closely compared with Title I information in the course of application review. Other states require the LEA to somehow indicate the differences between Title I projects and school programs already provided. For example, one state instructs the LEAs that "[s]olution strategies must indicate that the services for these participants are greater in time, type, or intensity

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(footnote continued from previous page)

of the Relationship Between Title I, ESEA and Selected State Compensatory Education Programs.

than services provided other pupils ..."

Another state application form requires slightly more information, viz.:

> A factual description of the services provided with funds from state and local sources at both its Title I and non-Title I schools that are similar to those which it proposes to support with Title I funds;
>
> The per pupil cost excluding federal funds for the two previous years; if aides are used in the Title I program, a description of their duties, indicating all duties for Title I purposes only. If aides are hired with non-Title I funds, a description of their duties must also be provided indicating that locally - paid aides provide services to all children. The two descriptions will then be compared to ensure that the Title I aides are performing duties which are supplementary.

Even those states which require some application information concerning "ordinarily provided" services have indicated that the application alone is insufficient for evaluating compliance. Nevertheless, such information may serve to flag potential problems, and thereby direct further SEA inquiries in both the application approval and monitoring processes. For this reason, we recommend that OE incorporate into its application regulations the language of Program Guide No. 57, which states:

> ...the local education agency shall

> describe the services (of the type applied for) already provided by State and local funds in project and non-project schools. For example, if a local educational agency requires Title I funds to finance a food service program in a project area school, it shall provide comparative data on the provision of food services to that school and to non-project area schools before the addition of Title I funds to the project area school.

In addition, we would recommend the following final sentence:

> The local educational agency shall also describe how Title I funded services will differ from the similar services provided by State and local funds.

The above recommendation contemplates LEA information of a general rather than exhaustive nature. Any further supportive details should be retained in LEA and school-level records (see discussion below).

Current federal regulations specify school-level recordkeeping requirements for comparability which are related to the "ordinarily provided" provision but which fail to address it directly. Similarly, the SEAs have no formal requirements for LEA documentation of Title I and non-Title I services. In terms of monitoring, therefore, there is a great amount of flexibility and potential for abuse, especially since few non-Title I schools are ever monitored. For example, in _Nicholson_ v. _Pittenger_, 364 F. Supp. 669 (E.D. Pa. 1973), the federal district court found lack of compliance with the "ordinarily provided" provision, and indicated the kinds of documentation which the SEA might have used in determining compliance.

> For example, defendants have not required Philadelphia to submit lists of educational programs provided in non-Title I schools, nor have defendants required Philadelphia to submit lists of employees and job descriptions of employees who work in non-Title I schools. Therefore, defendants have no way to determine whether or not Title I programs in Title I schools are similar to non-Title I programs in non-Title I schools or whether or not non-Title I employees perform the same jobs as Title I employees (at 674, emphasis added).

Our previous recommendation concerning LEA application information would provide the SEA with general data of the sort described by the Court in Nicholson v. Pittenger, and enable threshold determinations of compliance. In keeping with the view of the court, we further recommend that lists of educational services in Title I and non-Title I schools and lists of employees and job descriptions of Title I and non-Title I employees be maintained at the LEA offices for purposes of SEA monitoring. Principals in Title I schools must have knowledge of the responsibilities performed by persons paid with Title I funds. By amending the federal regulations to incorporate these recordkeeping requirements, the SEAs will be better able to determine whether state and locally funded services are available on an equitable basis to both project and non-project schools and to ensure that Title I funds are not providing such services.

CHAPTER 12

GENERAL AID

CHAPTER 12

GENERAL AID PROHIBITION

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CHAPTER 12
GENERAL AID PROHIBITION

I. Introduction

A. Overview of the Federal Legal Framework

1. Purpose and Language of the General Aid Provision

The preceding Chapters described and analyzed the "supplanting", "comparability", and "ordinarily provided" provisions. We explained that the basic purposes of these provisions are to ensure (a) that, at a minimum, project areas are provided with services paid for with state and local funds that are similar or comparable to services provided in non-project area schools; (b) that project areas and children participating in Title I programs are not penalized in the application of state and local funds because they receive Title I assistance; and (c) that in no case are Title I funds used to pay for services which would be provided with state and local funds but for the existence of Title I. Title I funds may only be used to pay for the excess costs of programs.

Assuming that the local school district complies with all of the above provisions, there still remains the possibility that Title I funds will not be used to meet the pressing needs of educationally deprived children, who are the intended beneficiaries of the Title I legislation. As we explained supra., the Eighth Circuit Court of Appeals has held, in Barrera v. Wheeler, 475 F. 2d 1338, 1352 that "the Act itself makes it readily apparent that Title I appropriations are federal grants made in trust to local school agencies for the benefit of educationally disadvantaged children."[220] Thus, it is unacceptable to use Title I funds to (a) meet the needs of the school district, e.g., by constructing a building housing the entire central administration; or (b) the needs of an entire school, e.g., building a gymnasium; or (c) the needs of the school's entire student population e.g., hiring a nurse to serve all children rather than focusing the limited Title I dollars on meeting the pressing needs of educationally deprived children.

Recent legislative history explained the purpose of the general aid prohibition by stating: "funds are [to be] concentrated on the priority needs of poor children and are not [to be] diverted to meeting other needs of school systems, however pressing these other needs may be." (S. Rpt. No. 91-634, [1970] U.S. Code Cong. and Adm. News 2777).

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[220] The Supreme Court, when it heard this case on appeal, did not question the Court of Appeals Wheeler v. Barrera, 392 U.S.309 (1974).

In furtherance of this generally stated purpose the Congressional Declaration of Policy set forth in Section 101 of the Statute provides, in relevant part, that the purpose of Title I is to provide financial assistance to LEAs to expand and improve educational programs "which contribute particularly to meeting the special educational needs of educationally deprived children."

The Title I legislation adds that programs and projects funded under Title I must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of educationally deprived children. (Section 141 (a)(1)(B)).

In accordance with the Congressional Declaration of Policy, the initial set of regulations promulgated by OE in 1966 contained a general aid provision (45 C.F.R. §116.17(e)(1966)). The general aid prohibition set forth in the existing regulations has not changed since 1968. The existing regulation provides (45 C.F.R. §116.17(g) (1974)):

> Each such project must be tailored to contribute particularly towards meeting one or more of the special

> educational needs of educationally deprived children and should not be designed merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school.

The clear prohibition against the use of Title I funds for general aid purposes set forth in the regulations was not equally clear in the early days of Title I. As one SEA Title I Director explained, "although there was always a general aid prohibition in the regulations, an OF handbook allowed us to use Title I funds for general school system improvements. We followed these suggested practices. Today, we would never approve practices suggested in that handbook."

The handbook referred to is entitled: Guidelines: Special Programs for Educationally Deprived Children, Elementary and Secondary Education Act of 1965/ Title I (OE-35079). This handbook was issued in 1966 and was not officially canceled until 1972.

One particular paragraph included in this guideline was cited in support of LEA practices, which, as we will see *infra*., have been deemed to be violative of the general aid prohibition set forth in the regulations. This paragraph provides that:

> Some projects will by their very

nature tend to benefit all children in a school, whether they are educationally deprived or not. Examples would be projects which devoted substantial resources to reduction in class size; to the addition of guidance counselors, teacher aides, and librarians; to the acquisition of classroom equipment; or the inservice training of elementary school teachers. Other projects may be more selective and devote substantial resources to services that tend to benefit recipients on the basis of their special educational needs. Examples of these services might be remedial classes, special classes, provision of food or clothing, or after school study centers. Projects of the first type would lend themselves particularly to schools that are severly depressed and overwhelmingly impacted by educationally deprived children from low-income areas. Projects of the second type would be more suitable to schools which serve areas with high concentrations of children from low-income families but at the same time have substantial numbers of children who are not educationally deprived.

2. Relationship Between the General Aid Prohibition and Other LEA Program Requirements

As we explained supra., the general aid prohibition is the basic provision ensuring that the categorical intent of Title I is carried out. Therefore, when viewed broadly, a violation of other requirements preserving the categorical nature of Title I may also be a violation of this provision.

For example, as one SEA Title I Director explained, "every supplanting violation is also a violation of the general aid provision. If a principal uses Title I funds to provide a child's reading instruction to educationally deprived children and the identical instruction is being provided to non-Title I children, a typical supplanting violation will have occured. It can also be said that Title I funds are being used to benefit non-Title I children since by replacing certain state and local funds with Title I, the funds which should have been spent for Title I children can be used to meet the needs of the entire school population." Although we agree with this analysis, for purposes of this paper the above described penalization of educationally deprived childrein in the provision or application of state and local funds because they are receiving assistance under Title I will only be considered a violation of the supplement, not supplant provision. The failure to concentrate funds on programs meeting the needs of educationally deprived children will be considered a general aid violation.

There is also a direct relationship between the general aid prohibition and the program development requirements such as needs assessment, establishing program objectives, program design and concentration.

Several states explained that LEAs which comply with the program development requirements seldom have any difficulty complying with the general aid provisions. Specifically, one state explained that general aid violations occur "when the LEAs get away from program priorities" and "when the program is not concentrated on a limited number of educationally deprived children."

In two other states, the SEAs explained that general aid is not a problem in their states "because LEAs may only use Title I funds to meet the highest priority instructional needs as identified in the needs assessment, of those children who are furthest behind, as identified in such needs assessment." "Since there is never enough money to serve all needs (one-half of the children, identified by the needs assessment, who are in need of reading help do not get it), the question of serving other needs is indefensible for the LEA to raise."

In sum, these states explained that most general aid violations occur because the program is not designed or implemented in accordance with the needs assessment and the program goals and objectives established pursuant thereto. The most frequent violations (see infra.) result from using Title I funds to meet low priority goals and/or to meet the needs of all children rather than the needs of those children who are in greatest need in accordance with the needs assessment. Several SEAs explained that since the level of Congressional appropriations generally does not even permit an LEA to meet the highest priority needs of all of the children identified in the needs assessment, it would be indefensible to use Title I funds to meet the needs of all children.

B. Organization of This Chapter

The preceding section of the paper described and explained the purposes of the general aid prohibition and the language of the existing regulation. Subsequent sections of the paper will analyze the meaning of the prohibition with respect to certain categories of expenditures which have been the focus of attention, including, among other things, equipment, materials and supplies, support services, use of teacher aides and field trips. We will also describe some of the conceptual and practical problems identified by the SEAs included in our survey. Finally, we will set out our conclusions and recommendations.

C. Major Issues, Conclusions and Recommendations

We have concluded that to the extent Congress intends to continue Title I as a categorical aid program serving educationally deprived children residing in low-income areas, it is necessary that the prohibition against the use of Title I funds for general aid purposes be preserved.

We found, based on our survey in ten states that the existence of the general aid prohibition has facilitated the focus of limited Title I dollars on programs which are designed to meet the most pressing needs (identified in the needs assessment) of the educationally deprived children who are in greatest need of assistance. As one SEA Title I Director explained (see *supra*.) "since there is never enough money to serve all needs, the question of serving other [lower-priority] needs is indefensible for the LEA to raise."

We have also concluded that the general aid prohibition is *not* restrictive, except in the sense that it ensures (a) that the intended beneficiaries, i.e., educationally deprived children who are in greatest need of assistance, actually receive the limited financial assistance that is due them under the Act; and (b) that such funds are not diverted to meeting the school districts' other needs, however pressing.

The general aid prohibition does not, for example, prohibit the use of Title I funds to purchase equipment, pay for supportive services, or in a particular school district, based on a needs assessment, to pay for instruction in art or music. The prohibition does determine which children may participate in programs funded under Title I, i.e., educationally deprived children.

We found that in response to HEW audits and OE Review Team reports, several SEAs are pursuing unnecessarily restrictive policies which go beyond the general aid prohibition. These SEAs are pursuing the safest course of action with respect to potential liability which would result from misexpenditures of Title I funds.

On the other hand, we found SEAs, faced with the same HEW and OE findings, which pursued non-restrictive policies consistent with OE policy. These SEAs informed their LEAs about the various acceptable purposes for which the Title I funds can be expended. The primary considerations set forth in their policy papers concern (a) whether the program is designed to meet the highest priority need identified in the needs assessment; (b) whether the program participants are educationally deprived children and (c) whether the service is already being provided to non-participants with state and local funds (see"supplement, not supplant"chapter).

Several problems were identified by SEAs, some of which were conceptual in nature, others practical. With respect to the conceptual problems, some SEAs explained that any compensatory education effort should be directed primarily toward changing the school environment and should not focus on or blame the child for his/her lack of educational attainment. Furthermore, these SEAs explained that the labelling of children as "educationally deprived" stigmatizes these children, especially where the LEA designs a "pull-out" program, i.e., where the children receive their special instruction in a place other than their regular classroom. It should be noted that several other SEAs did not share these views.

We have explained elsewhere that based on the child-benefit theory, the entire focus of Title I is in fact on providing financial assistance to LEAs for educationally deprived children and not financial assistance to the public or private schools. Our analysis of the above conceptual questions appears supra., at p. 542 in the "supplement, not supplant" chapter.

With respect to the practical problems, some SEAs explained that it makes little sense to have a general aid prohibition in a large urban area or poor rural district where almost the entire population at a given school is educationally deprived. We agree and have made specific recommendations concerning the situation where 80 percent or more of the students in a school are educationally deprived.

A second problem identified by a few SEAs concerns the incidental use of Title I purchased resources or the incidental assistance provided by a Title I paid teacher aide to children not participating in the program. The prohibition, like any regulation or statutory provision should not be interpreted as requiring the absurd. 221/ Thus, we recommend that OE explain in a manual that the prohibition does not restrict the infrequent, insubstantial, insignificant use of Title I funds for non-Title I children.

221/ See e.g., United Airlines, Inc. v. C.A.B., 278 F. 2d 446, 449 (C.A.D.C. 1960).

II. Categories of Allowable Expenditures Under Title I

A. Introduction and Overview

1. Organization of This Section

One of the central questions facing LEAs receiving funds under Title I is which categories or types of expenditures are allowable under Title I? This section will analyze this question as it relates to the general aid prohibition[222] with specific reference to such categories as: supportive services, use of Title I for non-basic skill subject areas, materials, supplies, and equipment, use of teacher aides, and field trips. Before we proceed with this analysis, it is important for the reader to understand, in general terms, the types of LEA expenditures which have been disallowed by HEW and the general effect these findings have had on the states included in our survey.

2. Illustrations of Typical General Aid Violations

In order to better understand the meaning and effect of the general aid prohibition on the design of programs,

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222/ For the definition of an allowable expenditure generally see 45 C.F.R. §100b.81 and appendices (1974).

it is important to consider the various types of violations identified by HEW and OE. Thus, we asked the SEAs included in our survey to relate typical violations and the effect of auditor's findings on future LEA activities.

First, a typical districtwide general aid violation might occur where Title I funds are used to operate a reading center servicing all children within the district, regardless of whether the children reside in project areas and regardless of whether the children are educationally deprived. Another typical violation would be the use of Title I funds to pay for an audio-visual instructional system servicing the entire district.

Typical general aid violations occuring within a school include the use of Title I funds for physical education, art, music, home economics classes for the entire school population; for counseling and nursing services for all students; to pay for resource center aides and consultants used by or for the entire staff; and to pay for a breakfast program servicing all children in the school.

Typical audit exceptions concerning the use of equipment, materials, and supplies included the use of projectors, copy machines, tape recorders, phonographs, calculators, adding machines, etc. for general school purposes.

Typical general aid violations occurring within the classroom include the use of Title I purchased materials, supplies, and equipment by children who are not identified as project participants and the use of teacher aides to meet the needs of all children within the class. As explained in one audit, "there was no specific outline of duties for identified Title I children. There was no demonstration that Title I paid teacher aides allowed the regular classroom teachers to perform compensatory education services as opposed to providing services to all children".

3. State Responses to HEW Audits and OE Review Team Reports

In several states included in our survey, the effect of these determinations by HEW and OE on the SEAs interpretation of what constitutes a non-general aid program has been dramatic. The nature of the influence varies from state to state.

In one state, as a result of an HEW audit, the following basic policy changes were instituted at the state level. (Note that the SEA did not expressly prohibit particular programs but rather explained the circumstances under which they may legally operate).

(1) focus on high priority needs, especially basic skills;

(2) issuance of express policies concerning the use of equipment and how and under what conditions an LEA could offer such support services as nurses, librarians, psychologists, and counselors;

(3) the development of state policies concerning under what conditions inservice training may be offered to teachers and teacher aides;

(4) the development of express state policies concerning the circumstances under which aides paid for with Title I funds may work with non-Title I children.

Similarly, in a second state in response to an HEW audit, the SEA explained, in a memorandum disseminated to all LEAs, the circumstances under which a particular program component would be considered legal. Apparently, the major focus of the HEW audit was the provision of support services to children who did not participate in instructional activities (see *infra*.). This state policy explains:

> "The legitimacy of a particular program is determined by the students it serves. Therefore support services (counselling, health services, etc.) may be legitimately funded programs in one situation because they are directing their effort toward remediating the particular problems which may contribute to identified children's educational deficiencies. However, the same kinds of services would not be legitimate Title I activities if they were directed to children who had no identified academic deficiencies."
>
> "...Beginning with FY ___ programs, there will be a refocus of emphasis to children with deficiencies in educational attainment. This will not result in the elimination of social services...but simply require that school districts address the social, health, and dental needs of children with deficiencies in educational attainment only."

In a third state, the SEA responded to an HEW audit by prohibiting several types of program designs rather than explaining the circumstances under which Title I may be legally expended:

(1) all programs in the state must be "pull-out";

(2) no teacher aides may be employed in the regular classrooms;

(3) programs are limited to reading, mathematics, and language arts;

(4) priority needs must be served as ranked, and,

(5) no counselors, librarians, psychologists, or other support services are permitted except in extreme circumstances.

In two states the SEA responded to HEW audit findings by substantially "beefing up" their Title I application forms and instructions so that potential general aid violations are more apparent from the application itself. By identifying problem areas at this early date, the SEAs believed that many of the "compliance" issues and resulting antagonisms would be headed off.

B. Support Services

1. Federal Legal Framework

The Title I regulations contain little guidance concerning the legal expenditure of Title I funds for support services. However, OE has outlined its policy in guidelines[223/] and correspondence to two SEAs included in our survey.

In one letter, the LEA inquired into the legality of using Title I for support services and, secondly, which children may receive such services. OE explained:

> Title I programs should be designed to meet in order of priority the special educational needs of the most severely educationally deprived children as determined by the assessment of needs of children in the project area. Support services should be provided, as needed, to children who are participating in Title I instructional programs on the basis of their educational needs.

In a second letter, OE was asked whether "life support" services could be provided to educationally deprived children who were not deemed to be from poor families.

> As you know, life support services can be provided under Title I only if they are found to be necessary to the accomplishment of certain educational goals for specific children. Such children, therefore, must be receiving some special service designed to overcome some identified educational deficiency...as you know, however, such services are not to be supplied under Title I unless they are shown to be unavailable from other sources. Such services are deemed to be available if they can be provided...by the child's family... .

[223/] See infra. under Coordination, Chapter 14 for a description of the relevant program guides (#60, 60A, 60B).

In sum, the OE policy is that support services paid for with Title I funds may be provided only to children who are actually participating in Title I programs and only if they are unavailable from other sources. If the participating child's parents are able to afford such services, they are deemed available from other sources and Title I funds may not be used.

2. State Legal Framework

Based on our interviews and a review of the state material, it is apparent that all states included in our survey expressed concurrence with the policy set forth in the first letter that only children who are participating in the instructional component of the program may receive support services under Title I. Most of the states expressed concurrence with the second point concerning availability from other sources.

This is not to say this policy has always been followed in the various states. It appears that as a result of either audit findings or statements in OE Review Team Reports that this policy has filtered down to the SEAs, probably within the last two years.

Several SEAs indicated that prior to 1974 the use of Title I funds to provide support services for children not otherwise receiving instructional services was one of the most frequent general aid audit exceptions.[224]

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[224] See, e.g., the state policy developed by one state *supra.*, at p. 691 in response to numerous audit exceptions related to the use of Title I funds for support services and non-basic skills areas.

3. Policy Analysis and Recommendations

We recommend that the OE policies described above be set forth in OE regulations and the proposed OE manual.

C. Materials, Supplies, and Equipment

1. Introduction

Historically, the misuse of equipment, materials and supplies by LEAs for general aid purposes has been one of the most often repeated audit exceptions cited by HEW auditors. Many of the Title I Directors we interviewed explained that in the early days, "LEAs had free rein concerning such purchases." In recognition of these early "abuses", the SEAs in most of the states we visited developed extensive policy statements regarding such issues as standards for use, justification for purchase, maintenance of inventory records and disposition. In fact, it is safe to conclude that the written policies controlling this aspect of Title I management are more extensive than the policies developed in any other area.

Since the policies which have been developed are so extensive, we will not attempt to set forth the particulars of property management. Rather, we will attempt to relate the general principles and standards developed by the states to the policy statements set forth in the federal legal framework.

2. Overview of Federal Legal Framework

The management of property purchased pursuant to any federal grant or subgrant program, including Title I, is generally controlled by the provisions of Subpart L of Part 100b of Title 45 of the Code of Federal Regulations (Section 209-220). These regulations were issued pursuant to the General Education Provisions Act. In addition, the Title I regulations and guidelines contain specific provisions governing the management of property purchased with Title I funds. These prescriptions generally relate other requirements of Title I, e.g., program design, general aid and supplanting to such purchases. For purposes of our discussion, we will only describe those aspects of the legal framework specifically relevant to the Title I program requirements controlling the management of Title I purchased property.

The Title I regulations contain one phrase which several SEAs included in our survey have interpreted as clarifying the extent to which property purchased with Title I funds may be used for non-Title I purposes under the general aid provision. The relevant sentence appears in Section 116.20(a) which generally describes the standards controlling the question of property management in private schools.

> The *incidental* use of such property for other purposes is permitted only for related educational purposes on public premises and *only so long as such a use does not interfere with the carrying out of a Title I project*.

A letter from OE to an LEA concerned the question of "whether school buses purchased with Title I funds may be used to transport non-Title I children provided this service does not interfere with the regular Title I reading transportation program". OE interpreted the phrase "incidental use" by explaining what the phrase does *not* mean. OE explained, "we do *not* consider the *regular daily* use of such buses for non-Title I purposes to be an "incidental use".

In summary, the OE letter explained that the district had the following obligations:

> (1) To provide with State and local funds a sufficient number of vehicles for the transportation of its children to school;
>
> (2) To utilize those vehicles as much as needed in its Title I programs (Title I funds may be used to cover additional operating expenses);
>
> (3) To provide needed additional vehicles with Title I funds but only to the extent that the transportation requirements of the Title I program cannot be met using vehicles acquired with State and local funds;
>
> (4) Remove its obligations on the use of any surplus Title I buses by selling them or paying the Federal Government for their fair market value.

The Title I regulations (45 C.F.R. §116.18(a)(1974) also explain that "the budget for a project shall avoid imprudent, extravagant or wasteful expenditures which would tend to defeat the intent of the Act to meet the special educational needs of educationally deprived children".

Program Guide No. 44, Section 5.6 explains that all purchases of equipment must be "fully justified". The guideline also contains minimum criteria for determining whether a justification is acceptable.

> All requests for the approval of funds for the purchase of initial or replacement equipment must be fully justified. This means that the applicant must show that (a) equipment has been selected and designated for specific purposes in connection with proposed project activities, (b) the proposed equipment is essential to the effective implementation of the project, (c) such equip-

> ment is not available in the applicant's regular or Title I inventories for use in the project, and (d) the applicant has the trained staff to utilize the proposed new equipment effectively or that arrangements will be made to prepare staff for such use. The State educational agency will review existing Title I inventories and insure that equipment already purchased with Title I funds is being effectively used for Title I purposes. Equipment that is no longer appropriate for use in Title I projects should be sold or transferred to the applicant's regular inventory and the appropriate amounts refunded to the Federal Government.

3. State Legal Framework

As stated supra. most of the states included in our survey have developed extensive policies controlling the purchase and use of materials, supplies, and equipment. Set forth below is a sampling of these policies. It should be noted that most of these policy statements do not expressly explain the circumstances under which such materials may be used for non-Title I purposes. As one SEA Title I Director explained "we don't want the exception to become the rule so we don't include it." When questioned further, the SEA explained this approach in terms of a history within the state of substantial abuses regarding the use of equipment, materials and supplies for general aid purposes.

In one state, the SEA's policy is set forth in a general manual containing policy statements on specific areas which have been the subject of concern. The policy statement generally explains that "the only justification for expenditures for equipment, materials, and/or supplies is that they are required in order to implement a Title I project service or activity. Any application requesting approval for purchase of equipment, materials, and supplies must include a complete explanation of the need for such items." The policy statement then generally recites the minimum criteria set forth in Program Guide No. 44 supra. regarding adequate justification.

In another state, the SEA has explained that "all projects which include a request for funds for the purchase of equipment and supplies must include a complete justification, including

> (1) an explanation of how the use of this particular equipment and/or supplies is going to relate to the most pressing needs of the most severely disadvantaged children as determined by your comprehensive needs assessment.
>
> (2) A statement that the type of equipment and/or supplies requested is not being supplied at district expense for the use of children who are not in the Title I project.
>
> (3) That the equipment and supplies being requested is for the exclusive use of Title I children.

In another state, the SEA guidelines describe one policy for supplies and materials and a second policy regarding equipment. First with respect to supplies and materials, the SEA policy explains that:

> Supplies and instructional materials purchased with Title I funds are to be used only in Title I activities. These items are not to be used by all teachers, pupils, and others but only children who participate in legal Title I projects. The expenditures requested should be proportionate to the number of educationally deprived children in the project. Requests for supplies and materials which appear to be out of proportion for the number of participants in an instructional activity or supportive service will not be approved. This budget item and expenditures in this area will be reviewed by the Title I staff when each local educational agency project is monitored.

With respect to equipment, the State guidelines provide, in part, that:

> Each local educational agency Title I project application and/or budget revision must have attached to it an itemized list and cost breakdown of all equipment which is requested for a project. Each item of equipment requested must be fully justified by giving an explanation as to why this item is necessary for a specific instructional activity or supportive service. Requests for new items of equipment will be limited to items which are essential to the effective implemen-

> tation and operation of a project activity. Such requests may also be proportionate to the number of educationally deprived children included in the project. Equipment requests which appear to be out of proportion for the number of participants in the project will not be approved.

In a fourth state, the SEA guidelines, include, among other things, the following criterion for determining the acceptability of a justification:

> the cost benefit of the item proposed, i.e., the cost per participant is justifiable in accordance with the number of students who will receive the benefits of the item of equipment or the cost per staff member must be justified in terms of the benefits derived by the project population if the item is for use by the project staff.

During our interviews, we asked whether and under what circumstances materials, supplies and equipment purchased with Title I funds could be used for non-Title I purposes. As explained _supra_. the written materials generally did not recognize the legitimacy of such use under Title I. However, most of the SEAs, explained that "incidental use" was permissible. Specific SEA responses are set forth below.

In one state, for example, although the application instructions provide that "_no_ equipment should be requested that will not be used _exclusively_ for the Title I project", the Title I Director explained that to the extent that the equipment was used for non-Title I purposes, to any significant degree, "the LEA must reimburse the Title I program otherwise a general aid violation will have occured."

In a second state, the Title I Director explained that "occasionally" Title I purchased equipment may be used for non-Title I purposes but "only if such use does not result in a decrease in property value."

A third SEA explained that with respect to non-instructional equipment e.g. typewriters, duplicating machines, the justification is scrutinized with "a fine tooth comb". This SEA also explained that if the materials and supplies are in fact purchased to meet an educationally deprived child's "special" needs pursuant to the needs assessment then there should rarely be any reason for such materials to be used for non-Title I purposes because the materials should be appropriate for children who need remediation. The SEA explained that to the extent they are also appropriate and used for non-Title I purposes, the LEA should reimburse the Title I project.

In another state, the SEA will not approve any Title I application which includes a budget request for equipment totalling greater than 6% (10% for materials and supplies) of the total budget without detailed justifications and close scrutiny by the SEA Title I staff.

4. Policy Analysis and Recommendations

We recommend that OE clarify in the proposed policy manual the meaning of the phrase "incidental use" as an exception, in certain circumstances to the general prohibition against the use of resources purchased with Title I funds for non-Title I purposes. See infra, for our recommendations concerning content of this aspect of the manual.

D. The Use of Teacher Aides

1. Introduction

Based on our interviews, it appears that in many LEAs a significant percentage of Title I funds is used to pay the salaries of teacher aides. The existing regulations and guidelines specifically recognize the employment of teacher aides only with respect to the provision of a "coordinated program for the joint training of the aides and the professional staff whom they will assist," (45 C.F.R. §116.17(m)(1974). Set forth below is a description of the OE informal legal framework concerning the use of teacher aides.

2. Overview of the Federal Legal Framework

We reviewed two letters written by OE to SEAs which set forth statements of policy concerning teacher aides. The first letter concerns the duties which an aid paid for under Title I may and may not perform. The second letter concerns the use of teacher aides in the regular classroom.

In response to a letter from the Title I Director in one state concerning the use of Title I paid teacher aides for hall duty, cafeteria duty, etc., OE explained:

> Your inquiry relates specifically to the use of Title I aides for 'cafeteria supervision, bus duty, playground duties, library duties, and corridor supervision. Such functions are not part of any Title I programs, and, therefore, compensation for carrying out such functions must be provided with state and local funds. It would be a violation of Title I requirements for an aide being paid entirely with Title I funds to perform such functions.

In response to a second letter concerning the use of teacher aides paid for with Title I funds in the regular classroom, OE explained:

> There is no statutory requirement that a Title I aide or paraprofessional must be under the direct supervision of a Title I teacher. Thus, it would be proper for a Title I aide or paraprofessional to be hired to assist a regular classroom teacher in order to free the teacher to perform Title I functions, or so that the aide may perform Title I functions as instructed by the teacher. However, it is important to note that the mere assignment of a teacher aide to a regular classroom teacher does not constitute a Title I program.

> The teacher aide must be a part of a more comprehensive program particularly designed to meet the special educational needs of educationally deprived children. Teacher aides must be placed where they can be most useful in carrying out the Title I program in accordance with specific objectives. Any supervising teacher assigned a Title I aide must know and be accountable for the contribution the aide is supposed to make to the realization of the objectives of the Title I program.

3. State Legal Framework

The SEA statements of policy regarding the duties performed by teacher aides paid for with Title I funds are divided into two areas, the first concerning generally acceptable and unacceptable duties, the second concerning the use of teacher aides within, as opposed to outside the regular classroom.

With respect to questions of acceptable v. unacceptable duties, the following represents a sampling of SEA policies.

In one state, the SEA policy explains that

> these aides may be used only under certain conditions. Their services must be restricted to those children who are identified as receiving Title I services. They may not serve non-Title I children. Some examples of unacceptable duties are: cafeteria supervision, study hall supervision, bus duty, playground duty, library duty, and corridor duty."
>
> "Duties that are acceptable include:
>
> 1. reducing the amount of Title I teachers' paperwork.
>
> 2. giving more individual attention to Title I children.
>
> 3. gaining the confidence of Title I children.
>
> 4. performing clerical duties for Title I teachers only.
>
> 5. working with eligible Title I children in instructional activities, but under the direct supervision of the Title I teacher.

A second SEA issued a general memorandum to all LEAs concerning duties performed by teacher aides "since the question was one of general concern statewide".

This memorandum explains the state's policy regarding such duties as hal duty and cafeteria duty. Note that this policy is inconsistent with the OE policy set forth in a letter quoted supra., and with the first state's policy.

> ...whenever the teachers--under whom the Title I teacher aides are working-are engaged in the teaching and/or necessary planning processes in order to meet the objectives of an approved project, Title I aides must be present to assist them...on the other hand, during those periods of time when the teachers--under whom the Title I aides are working-are not engaged in the teaching and/or required planning processes, Title I teacher aides, in our opinion may be assigned

> on a proportiate basis to
> school duties in which all
> instructional personnel are
> assigned on a regularly
> scheduled and rotating basis.

After explaining this state policy, the memorandum ends with an ironic warning. "One thing should be kept in mind, however, as we work toward this end and that is the fact that during a prior audit the Department was criticized for permitting districts to use Title I funds to pay Title I teacher aides for services not related to an approved Title I project." In this case, the SEA Title I Director explained to us that in developing the above policy he was forced to weigh the potential for abuse resulting from Title I paid aides assuming responsibilities such as hall duty, at the same time the teacher is assuming such responsibilities, against the ill-feelings which might result among the staffs in the various Title I schools because of the strict OE interpretation which creates two classes of teachers, only one of which must assume non-instructional responsibilities. He decided that good-will among the staff was more important.

With respect to the application of the general aid prohibitions to Title I aides working with regular classroom teachers in their classes, three states have written policies. The first state categorically prohibits the use of Title I paid teacher aides in the regular classroom.

A second SEA explains:

> Persons paid 100% from Title I funds must limit their activities to specific identifiable educationally disadvantaged children, who meet the district's criteria for participation in one or more components of an approved Title I project .

The policy announced by a third state provides that Title I paid teacher aides working within the regular classroom,

> may not perform general classroom duties such as correcting papers,... nor general classroom housekeeping chores. If the district wishes the aides to perform these duties, then that portion of time spent in the activities must be at district expense .

This policy statement also explains that a Title I paid teacher aide can certainly perform such housekeeping duties for a teacher paid for with Title I funds who is working only with children participating in the Title I project.

In a correspondence to an LEA, the SEA explained how the Title I teacher aide could function within the regular classroom.

> The Title I teacher would direct the Title I teacher aides to various regular classrooms to work only with the target pupils and reinforce activities initiated by the Title I teacher. The Title I teacher would also serve as a liason person with the regular liaison classroom teacher and other staff members to insure that the Title I activities reinforce the classroom activities and do not conflict with the normal school program.

Although most of the other states did not have written policies, they were able to respond to the question whether Title I teacher aides may work with non-Title I children to "free up" time for the regular classroom teacher to work with the Title I children? Recall, that the OE position with respect to this issue is "yes"; Title I paid aides may be used to free up time for the regular classroom teacher to spend additional time working with the children participating in the Title I program. The key concept is that the regular teacher will spend extra time which he/she otherwise would not have been able to spend with such children. In no case can the aide be used to free up time so that the regular classroom teacher can take a break or conduct general classroom duties.

Approximately half of the SEAs said "yes", the other half said "no". Those SEAs which responded in the affirmative explained that it is more beneficial to the children participating in the Title I funded program to receive services from a certified teacher than from a teacher aide. Those SEAs which responded in the negative explained that it was impossible to monitor such a practice to determine if the teacher is in fact working with Title I project children. One SEA explained, "such a policy would have the effect of providing regular classroom teachers with an extra coffee break with no benefit to the Title I children."

In one state, the SEA Title I Director explained that he would never allow a Title I teacher aide to work full-time within the regular classroom "so that such aide is not under the control of the regular classroom teacher. This policy guards against potential general aid abuses."

4. Policy Analysis and Recommendations

We recommend that OE explain this position in the proposed policy manual and that it also explain to LEAs and SEAs what would constitute an acceptable "audit trail" if the policy of allowing the teacher aide to "free up" time is pursued.

E. Field Trips

1. Introduction

The use of Title I funds for the purpose of taking children on field trips has historically been pursued by LEAs as a means of supplementing the school program and/or to provide "cultural enrichment" experiences for children participating in Title I programs. Recall that in accordance with the supplement, not supplant, excess costs, and "ordinarily provided" provisions (see preceding chapters), the project area schools and the children participating in Title I programs may not be penalized in the provision of state and local funds earmarked for field trips. Title I funds must be used to pay only for the excess costs of a field trip. In no case may Title I funds replace state and local funds that would have been provided for field trips but for the existence of Title I.

In addition to the above legal considerations, the inclusion of children not participating in Title I instructional programs has raised general aid questions. This segment of the paper will describe the various state policies regarding the general aid question. We were unable to find an OE policy statement concerning this issue.

2. State Legal Framework

Absent specific guidance from OE concerning field trips, the following sample of SEA policies is set forth below. In one state, the SEA's policy manual explains that:

> 1. Only educationally deprived children who reside in eligible Title I attendance areas may participate;
>
> 2. These children must be enrolled in a Title I instructional program and a proposed field trip should be designed to supplement the Title I instructional program;
>
> 3. Proposals for field trips as submitted in the application must include plans for integrating such experiences in the related Title I instructional program.

> 4. A rationale for each trip must be submitted to support the contention that the "educationally deprived childrens' special needs will be effectively served by such activity.

In a second state, the SEA was asked whether non-Title I participants could be included in a field trip. The SEA disseminated the following policy to its staff. "If a field trip is an activity designed to meet an objective for the compensatory education program, priority must be given to identified Title I participants. On a space available basis, non-participants may be included in a field trip."

A third SEA followed a similar policy but clarified this point by saying "if there were 150 Title I children occupying the seats of 1 5/6 buses, the remaining one-sixth could be occupied by non-Title I children. However, Title I funds could not be used to purchase a third bus."

3. Policy Analysis and Recommendations

To clarify the policy with respect to the inclusion of non-educationally deprived children on field trips funded exclusively under Title I, we recommend that an OE policy statement similar to the policy developed by the first SEA be included in the proposed OE manual. This statement is similar to the "incidental use" policy pertaining to equipment as set forth in the existing federal regulations.

III. Problems and Concerns With the General Aid Prohibition Identified by the SEAs and LEAs

A. Introduction

In the course of our interviews with state and local Title I personnel responsible for administering the program, four levels of problems with the general aid prohibtion in particular and the categorical nature of Title I in general were identified. The first level concerns the conceptual basis for providing special assistance to a subgroup of the student population. The second level concerns the political problems faced by the school administration which must explain why some but not all children receive supplementary services. The third level concerns the meaning and scope of the general aid prohibition, e.g., "does the general aid prohibition prevent a nurse paid for with Title I funds from aiding a non-Title I child who has broken his leg?" The SEAs also explained that it was often difficult to demonstrate compliance, especially where the LEA designs an in-class program. This issue will be discussed under Section IV concerning application forms, monitoring and recordkeeping.

B. Conceptual Problems Identified by SEAs

1. Nature of the Problem

The SEAs which noted serious problems with the intra-school aspects of the "supplement, not supplant" provision (see *supra*) --- which generally prohibits LEAs from penalizing children participating in Title I programs in the provision of state and local funds because they are receiving special assistance under Title I -- also expressed similar problems with the general aid provisions. The concern expressed by one SEA derives from a basic premise "that the inadequacy and ineffectiveness of the school climate and environment is the most critical impediment to improving the achievement of disadvantaged children."

This SEA feels that the present focus on the child as being "deprived", rather than on the school environment, is detrimental to program effectiveness. This SEA expressed the opinion that the present structure of Title I has the effect of stigmatizing children participating in the program as "dummies" especially where the children are pulled-out from their regular classroom.

Consistent with these premises, the SEA would allow services and resources purchased with Title I funds to benefit and change the entire school or classroom, especially where the school services a high percentage of low-income children, many, if not all of whom, are considered "educationally deprived".

2. Policy Analysis and Recommendations

We find little support for the proposition that the categorical nature of Title I stigmatizes children or is detrimental to program effectiveness. Our analysis of the issues appears *supra*. in the chapter concerning intra-school supplanting. However, we do agree with the position that where a school serves a student population with a high percentage of educationally deprived children e.g., 80 percent, the school should be allowed to design programs for changing the school environment for all children, under specified conditions. The specific conditions and rationale for this recommendation are set forth *infra*. in this chapter under the subheading "Practical Problems".

C. Local Pressures to Use Title I Funds for General Aid Purposes

1. Nature of the Problem

A problem identified in several states and local school districts we visited concerned the basic notion of a categorical aid versus a general aid program, especially a program like Title I which provides substantial sums of money for a particular subgroup of the student population (i.e., educationally deprived children, and only for children within that subgroup residing in school attendance areas having high concentrations of children from low-income families).

As one LEA official explained, "the Title I program runs contrary to a long standing principle that schools should make the same investment of funds in each child. It is extremely difficult to explain to parents why their children are not receiving extra services that they know are being provided to other children. These pressures are enormous."

2. Policy Analysis and Recommendations

To the extent Congress is intent on focusing financial assistance on meeting the special educational needs of educationally deprived children residing in poor areas, we recommend that a strong and clearly phrased prohibition against the use of Title I funds for general aid purposes be included in the formal legal framework.

Without the prohibition, the constant and substantial pressure placed on school boards to use federal funds to benefit non-educationally deprived children would likely prevent educationally deprived children from receiving additional services.

D. Practical Problems With the General Aid Provision

1. Introduction

Two problems concerning the practical application of the general aid prohibition were identified during our interviews. The first concerns the application of this provision where 80 percent or more of the children at a particular school are educationally deprived. The second problem concerns the incidental use of services purchased with Title I funds. These issues are discussed below.

2. Schools With Substantial Concentrations of Children Who Are Educationally Deprived

It appears that in some urban school districts and rural districts which are extremely poor, there are Title I schools in which 80 percent or more of the children enrolled are educationally deprived. Several SEAs and local school officials argued that it makes little sense to concentrate efforts on the design of "special" programs for 80 percent of the school population. In this situation, it is difficult if not impossible to design a program for educationally deprived children which does not also meet the needs of the school.

We recommend that the Title I statute be amended along the lines of Section 150 (permitting demonstration projects) to permit NIE or OE to study the effects of allowing Title I funds to change the entire school program under certain conditions. We would support such a study because we feel that any school with such a high concentration of children who are educationally deprived will have an extremely difficult time (a) demonstrating compliance with the general aid prohibition and the intra-school supplanting provisions and, (b) administering or over-seeing the legal operation of a program in such a school.

In this case, the question of compliance would appear to be outweighed by thepractical realities of the situation, i.e., targeting 80 percent of the school population.

We recommend that the Title I statute be amended to permit an LEA to target all of the children in the school or selected grade levels where (a) at least 80 percent of a school body or at least 80 percent of the children in the grade levels that are targeted in that school have been shown to be educationally deprived by objective methods and utilizing the district-wide cut-off for participation in Title I and (b) each educationally deprived child in the school receives Title I funds in an amount consistent with the concentration requirement. For example, assume that there are 1000 children in school A; 80 percent or 800 children are considered educationally deprived. The states interprets the concentration provision as requiring that $300 of Title I funds be expended per participant. Thus, the school interested in qualifying for the exemption must receive, at a minimum, $240,000 in Title I funds (800 x $300).

In addition, the statute should require that the LEA pay for a proportional cost of the program with state or local general funds, i.e., the LEA would pay for 20 percent of the cost of the "Title I" program in a school where 80 percent of the children are educationally deprived.

We also recommend that the statute and regulations be amended to include the following conditions:

° With respect to the use of Title I funds, the LEA must still comply with all federal requirements, with the following exceptions: (1) the intra-school supplanting provisions, (2) the intra-school general aid prohibitions, and (3) the within school targeting of children provisions.

° The LEA, using supplementary state or local funds must pay its fair share of the program (e.g., if 80 percent of children are educationally deprived, the LEA's contribution is 20 percent). To ensure that the LEA's contribution simply replace other state and local funds that would have been provided but for the existence of this special program, all of the requirements protecting the supplementary nature of Title I funds apply with the following exceptions: (1) the intra-school supplanting provisions (see supra.) (2) the intra-school general aid prohibitions, (3) and the within school targeting of children provisions.

- The LEA may not use state or local compensatory education funds similar to Title I or any other special program otherwise exempt from the base under the excess costs provisions to pay for the 20 percent contribution to the special program.
- The state and local payments made under this plan must be excluded from the comparability computations.

Once it is agreed that the basic recommendation is reasonable, the conditions under which this policy should be allowed to operate must be examined.

The first recommendation set forth above is that the LEA must fund the program for all children enrolled in the school. For example, where 80 percent of the children are educationally deprived, 80 percent of the program should be funded with Title I and 20 percent with state and local funds (20 percent of the children are not considered educationally deprived).

Under the existing legal framework, Title I funds would be used to fund programs only for the 80 percent educationally deprived population. In other words, we conclude that Title I funds should only be used to fund programs for educationally deprived children, even in the situation where the total program would serve all children in a school. State and local funds should pay for the participation of non-educationally deprived children.

In accordance with the concentration requirements, i.e., the design of programs must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the needs of educationally deprived children, we conclude it is unreasonable to assume that allowing an additional 20 percent of the students to participate that it will not dilute the effectiveness of the program.

Furthermore, we conclude that it would be unreasonable to allow the limited appropriations available under Title I to be used for non-educationally deprived children, since to do so would prevent other eligible children in the school district from participating.

In sum, Title I should only pay for the excess costs of a program, e.g., 80 percent, although in this case the dollars need not be traced down to the child level since the program would involve changing the entire school environment.

In this chapter and in the preceding chapters, we analyzed the federal requirements which ensure that Title I funds will be used as categorical aid for meeting the special educational needs of educationally deprived children and not to replace or make up for past and present discrimination by the LEA in the provision of state and local funds or to meet the needs of the school district, however pressing.

The first and second conditions ensure that Title I as well as the local's special contribution supplements the level of state and local funds which would have been provided but for the existence of this special "Title I" program.

Thus, the requirements set forth in the federal legal framework generally apply with respect to the special program in schools with enrollments of educationally deprived children in excess of 80 percent of the total student population. However, there are several notable exceptions.

Since the entire school population may participate, the LEA must be exempted from the targeting of children requirement which ensures that only those educationally deprived children who are in greatest need of assistance receive the benefits. In this case, the LEA is not required to "trace Title I dollars" to the targeted children, since all children are program participants.

Furthermore, the intra-school supplanting and intra-school general aid prohibitions are inapplicable. In other words, the LEA need not demonstrate the educationally deprived children within the project school have not been penalized in the distribution of state and local funds by comparing the level of state and local support provided to non-educationally deprived children attending that school. The program, using Title I and special state funds, will be designed to generally aid that school.

The above policy should not be construed as to permit the LEA from discriminating against the special project school in the provision of state and local funds. Therefore the inter-school supplanting provisions, as well as the ordinarily provided, excess costs, and comparability provisions still apply.

Furthermore, neither the Title I funds nor the special local contribution may be used to generally aid the school district. Thus, it would still be illegal to pay for an instructional T.V. system serving the entire district, although such a system could be provided for the entire school (so long as it is not ordinarily provided in non-project areas with state and local funds).

The third condition set forth above explains that in a state which has a state or local compensatory education program similar to Title I, such funds may not be used to pay for the local's 20 percent share. The rationale for this condition is straightforward. For a program to be similar to

Title I, the participating children must be educationally deprived, as defined in the Title I regulations.[225/] Since the children constituting the 20 percent are not educationally deprived, by definition state and local compensatory education programs similar to Title I can not be used.

Finally, with respect to comparability, just like Title I funds, the special state or local 20 percent contribution must be excluded for purposes of computing comparability. Recall that Title I funds are excluded from the comparability computation because the fundamental purpose of the provision is to ensure that the Title I services are supplementary. Similarly, the state or local share must be excluded because it supplements the services generally provided with state and local funds.

3. The Incidental Use of Services Paid for Under Title I for Non-Title I Purposes

On several occasions persons at the local level posed questions of the following type: "suppose a child not participating in a Title I program broke his leg during recess. Can the nurse who is paid for solely out of Title I funds come to his assistance?"

[225/] See §116a.26(j)(5)(i), 40 F.R. 11486 (March 11, 1975) as proposed by OE.

We asked questions of this type to several SEAs and and to OE staff. In each case the response was identical. "Of course the nurse can assist the child!"

We have concluded (and in our opinion consistent with the interpretation of OE) that the general aid provision does not and has never been interpreted by OE and the SEAs of whom we inquired to prohibit the insignificant and insubstantial use of services paid for with Title I funds for non-Title I purposes.

In other words, the non-regular or infrequent use of such resources would appear to be acceptable where such use: (1) does not interfere with the use for Title I programs and projects, (2) does not diminish the value or accelerate the devaluation of the resource paid for under Title I, and (3) does not have the effect of reducing the number of educationally deprived children having the greatest need for assistance who would benefit from such resources or from other resources that could have been purchased but for the use for non-Title I purposes.

In light of the clarity of the answer to questions of this type concerning the nurse aiding the child with the broken leg, it is possible that some of the persons who raised this question knew that the general aid prohibition would not prohibit assistance in this emergency situation and were attempting to discredit the basic categorical nature of the program. However, others raised the question to point out the difficulty LEAs face in determining when a general aid violation has occurred when the circumstances are not so extreme. Many LEAs and SEA personnel explained that, fearing a federal audit, they are acting with extreme caution, often taking the most restrictive policy interpretation.

The approach is understandable in view of a past history in many states of substantial general aid violations.

We recommend that OE, using specific illustrations where possible, explain in its policy manual the circumstances, however infrequent, under which resources paid for with Title I funds may be used for non-Title I purposes.

IV. Application Forms, Monitoring Instruments, and Recordkeeping

A. Introduction

As discussed previously in this chapter, the general aid prohibition is closely related to those requirements which preserve the categorical nature of Title I (i.e., supplanting, comparability, and ordinarily provided provisions) as well as the Title I program development requirements. Thus, our discussion and recommendations as to application forms, monitoring, and recordkeeping in those areas should be read in conjunction with the discussion and recommendations which follow, in order that they might be viewed comprehensively and coherently. Since many aspects of SEA oversight concerning the general aid prohibition have been addressed in previous chapters, we have limited this section to additional or more specific details pertaining to general aid.

B. Application Forms

In terms of application approval, current federal regulations concerning project applications (45 C.F.R. §116.17 (g)(1974)) merely state that,

> Each such project must be tailored to contribute particularly toward meeting one or more of the special educational needs of

> educationally deprived children
> and should not be designed
> merely to meet the needs
> of schools or of the student
> body at large in a school or
> in a specified grade in a
> school.

However, in spite of the general language of this regulation, state application form coverage of the general aid prohibition has been fairly detailed and comprehensive, particularly with regard to purchases of Title I equipment and supplies. This is the case primarily due to extensive HEW audit coverage and frequent audit exceptions concerning non-Title I use of Title I equipment.

For example, virtually every state application form makes detailed inquiries into the use of and need for Title I equipment and supplies purchases. In a fairly representative manner, one state application form covers general aid prohibitions as to equipment and supplies in three ways. First, an itemized budget of capital outlays for equipment and supplies is required. Second, an annual equipment inventory report listing the nature and location of previously purchased equipment must be submitted with each application, along with a certification of its accuracy by the School District Superintendent. Finally, as to proposed capital outlays for equipment and materials, the following explanations must be given:

INSTRUCTIONAL: Describe and clearly identify the instructional procedures by which the objectives are to be attained. Describe what supplementary staff is needed and how they function, and what supplementary materials, supplies, consultant services, etc., are necessary to implement the project and in what way they are to be used. Budget items will not be approved unless their counterparts are explained herein.

CAPITAL OUTLAY: If a request for capital outlay is included there must be a justification by item or type of item. Justification must show that (a) equipment has been selected and designated for specific purposes in connection with proposed project, (b) the proposed equipment is essential to the effective implementation of the project, (c) such equipment is not available in the applicant's regular or Title I inventories for use in the project, and (d) the applicant has the trained staff to utilize the proposed new equipment effectively or that arrangements will be made to prepare staff for such use. How equipment is to be used should be addressed in Procedures. This section must indicate why the equipment is necessary.

Note that the above instructions cover both the relation of equipment and materials to program design and the reason why such equipment is necessary, which is intertwined with the "supplement, not supplant" and "ordinarily provided" provisions. (Other state application forms and their coverage of equipment and materials are discussed in Section II, supra.)

In the area of support services, detailed application inquiries are not as uniform among the states. Nevertheless, many states do require explanations of Title I support services which indicate compliance with the general aid prohibition. For example, the application instructions just quoted above require a description of supplementary staff, their role in the Title I project, and their necessity. Another state application form contains the following instructions, which require support services to be similarly related to Title I instructional activities.

> Supportive services include transportation, attendance, counseling, library, and health and dental services. Identify the services in colunm 1 and the instructional activities they support in colunm 7. Report appropriate information (cost of service, number of participants, cost per participant) in columns 2-6. Complete this item separately for regular term and summer term projects.

This same state also requires a description of the duties of Title I supportive service staff, which description "should be sufficient to enable the reviewer of the application to determine the average daily routine of the Title I staff and to determine that it is supplementary."

Finally, state application forms also cover job descriptions in varying degrees. Although such job descriptions may aid SEA reviewers in preventing general aid violations, they were surveyed in detail in the "supplement, not supplant" chapter and will not be reiterated here.

In order to formalize the application coverage of the states in the three areas described above--equipment and supplies, support services, and staff responsibilities--we recommend the following amendment to the federal regulations. Application coverage of the general aid prohibition should be required, addressing, at a minimum, these three areas. The present SEA application forms and instructions quoted above might serve as models in this regard. For example, staff descriptions might be required to contain "sufficient information to determine the average daily routine of the Title I staff and to determine that the general aid provision is not being violated." This recommendation would also further the policies underlying HEW audits, since its implementation would be in keeping with the SEA response to HEW audit exceptions.

C. Monitoring and Recordkeeping

SEA monitoring of compliance with the general aid prohibition is generally accomplished through on-site visits and examination of LEA and school records. As in the application form area, SEA practices for monitoring and recordkeeping have been bolstered as the result of HEW audit exceptions.

Thus, for example, most state monitoring instruments make several inquiries directed at "general aid" compliance, particularly in the area of equipment and supplies. Perhaps the most extensive monitoring coverage of general aid is the state monitoring instrument set out below, which stands in clear contrast to those monitoring instruments which call for only three to five observations by the SEA reviewer.

VIII. UTILIZATION OF PERSONNEL, EQUIPMENT, MATERIALS AND SUPPLIES FUNDED 100% WITH TITLE I FUNDS (116.30, 45CFR)

		YES	NO	SEE REMARKS	N/
1. Title I personnel who are direct charges to the project, devote their time exclusively to Title I activities:	1.				
a. Title I teachers	a.				
b. Title I aides	b.				
c. Coordinator	c.				
d. Pupil Personnel	d.				
e. Clerical	e.				
f. Other (Specify)________________________	f.				
2. Title I funded teachers are used as substitute teachers periodically during the absences of regular classroom teachers who are paid with State and local funds.	2.				
3. Title I teacher aides are used as substitute teachers periodically during the absences of regular classroom teachers who are paid with State and local funds.	3.				
4. Title I teacher aides are used as substitutes during the absences of regular teacher aides who are paid with State and local funds.	4.				
5. Title I teachers and/or Title I teacher aides participate equally in schoolwide non-instructional duties on a rotating basis with regular instructional personnel paid from State and local funds.	5.				
6. There is evidence that the Title I program is clearly supplementary and complementary to the district plan for allocation of resources.	6.				
a. Personnel - Administrative	a.				
b. Personnel - Instructional	b.				
c. Equipment	c.				
d. Materials and Supplies	d.				

XII. PROPERTY MANAGEMENT STANDARDS (100b.215, 45CFR)

		YES	NO	SEE REMARKS	N/A
1. Property records are maintained accurately and provide for:	1.				
a. Manufacturer's serial number or other identification number;	a.				
b. Description of the property;	b.				
c. Acquisition date and cost;	c.				
d. Source of the property;	d.				
e. Percentage of Federal funds used in the purchase of the property;	e.				
f. Location, use and condition of the property; and	f.				
g. Ultimate disposition data if transferred to another Federal program, bought by the local school district or sold to the public.	g.				
2. A physical inventory of property is taken and the results reconciled with the property records at least once every 2 years to verify the existence, current utilization and continued need for the property.	2.				
3. A control system is in effect to insure adequate safeguards to prevent loss, damage or theft of the property.	3.				
4. Any loss, damage or theft of nonexpendable property has been investigated and fully documented.	4.				
5. The recipient has replaced or repaired (with funds of such recipient) property which was lost, damaged or destroyed due to the negligence of the recipient.	5.				
6. Adequate maintenance procedures are implemented to keep the property in good condition.	6.				
7. When there is no longer a need for nonexpendable personal property to accomplish the purpose of the project, the recipient	7.				

		YES	NO	SEE REMARKS	N/A
has established procedures to use the property in connection with other Federal awards it has received in the following order or priority:					
a. Other awards under Federal programs administered by the U. S. Commissioner needing the property; and	a.	___	___	___	___
b. Awards of other Federal agencies needing the property.	b.	___	___	___	___
8. When the recipient no longer has need for non-expendable personal property in any of its Federally assisted projects, the property has been used for the recipient's own official activities in accordance with the following standards:	8.	___	___	___	___
a. If the property had an acquisition cost of less than $500 per unit and has been used 4 years or more, the recipient has used the property without reimbursement to the Federal Government or sold the property and retained the proceeds and has purged the items from the official Title I inventory; and	a.	___	___	___	___
b. For all of such property not covered under subparagraph 8(a), the recipient has retained the property for its own and provided a fair compensation to the Federal Government for the Federal share of the property. The amount of such compensation was computed by applying the percentage of Federal participation in the cost of the project to the current fair market value of the property. (Current fair market value was determined by engaging two (2) licensed appraisers to provide two (2) independent appraisals and the higher of the two appraisals constituted "current fair market valud". Current fair market value has been defined by the courts as what a willing buyer will pay a willing seller given a reasonable time to consummate the sale.)	b.	___	___	___	___

c.	If the property had an acquisition cost of $1,000 or less per unit, the recipient has sold the property and reimbursed the Federal Government; and	c.____	____	______	____
d.	If the property had an acquisition cost of over $1,000 per unit, the recipient requested disposition instructions from the State education agency.	d.____	____	______	____
9.	Proper sales procedures are established for unneeded property which would provide for competition to the extent practicable and result in the highest possible return.	9.____	____	______	____

XIV. LIFE SUPPORT SERVICES

(All Title I services, including Life Support Services must be based on needs as documented by a current needs assessment. Life Support Services can be provided under Title I only if they are found to be necessary to the accomplishment of certain educational goals for specifically identified children, and then only if they are not available from any other local, State or Federal source.)

			YES	NO	SEE REMARKS	N/A
1.	Adequate documentation exists to establish the need for Life Support Services.	1.	____	____	______	____
2.	The children receiving Life Support Services also participate in a Title I instructional program.	2.	____	____	______	____

3. There is a well-defined and published plan for involvement of Title I instructional personnel in the identification of children in need of Life Support Services. 3.____ ____ ______ ____

4. There is a well-defined and published plan for other resources, public and private, to provide Life Support Services. 4.____ ____ ______ ____

(Note that the above monitoring form supports the state emphasis on uniformity of non-instructional duties among all teachers, discussed supra. in Section II D, of this chapter.)

A clear emphasis which is evident from this and other monitoring instruments is on LEA recordkeeping, particularly as to equipment and supplies. SEA recordkeeping requirements in the states surveyed generally go far beyond the necessary records concerning Title I equipment used in private schools under 45 C.F.R. §116.20(b) of the current federal regulations, once again reflecting the importance of HEW audit exceptions in this area. Thus, most states require inventory records to be maintained as to the use and location of equipment and supplies; the state described above requires documentation of the need for support services; and other states require logs to be kept by teachers and/or teacher aides as to the services received by Title I participants.

In order to underline the importance of monitoring and recordkeeping for compliance with the general aid prohibition, we recommend that current regulations be amended to specifically require SEA monitoring of "general aid" compliance, at a minimum, in the areas of equipment and supplies, support services, and staff responsibilities.

Similarly, each LEA should be required to maintain records in this regard. The approaches of the states listed above, e.g., the use of teacher logs, might serve as models in this regard. Generally speaking, due to the current SEA practices in the oversight of general aid, few states should experience difficulty in complying with these recommended regulations. In addition, many of the records documenting compliance with the general aid prohibition will also serve to document compliance with the "supplement, not supplant", and "ordinarily provided" provisions, and vice versa, so that the number of records maintained should not prove overly voluminous or burdensome.

CHAPTER 13

PARENT INVOLVEMENT

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CHAPTER 13
PARENT INVOLVEMENT

I. Introduction

A. Overview of the Federal Legal Framework

Section 427 of the General Education Provisions Act authorizes the Commissioner to promulgate regulations pertaining to parent involvement in the case of any federal education program, such as Title I, in which he/she determines that "parental participation at the state or local level would increase the effectiveness of the program in achieving its purposes."

In accordance with this general authority, the Commissioner issued regulations in 1971 which set forth certain minimum LEA requirements, including the requirement that each LEA establish a district-wide Parent Advisory Council (PAC). These regulations presently appear in §116.17(o) of Title 45 of the Code of Federal Regulations.

In 1974, Congress amended Title I by adding certain explicit parent involvement requirements, including the establishment of school-level PACs in addition to a district PAC. On March 11, 1975, OE published in the Federal Register a notice of proposed rulemaking which included proposed revisions to the existing parent involvement regulations. These proposed regulations will be republished in the Federal Register as final regulations at some date in the future.

From a legal point of view, the requirements set forth in a statute always predominate over requirements contained in regulations, to the extent the latter are inconsistent with the former. Furthermore, statutory requirements are binding on state and LEAs as of the date the legislation also adopted (unless otherwise specified). Therefore, during the period preceding the project's interviews, the states should have been complying with the statutory requirements concerning parent involvement and the requirements set forth in the regulations not contrary to the statutory provisions.

For example, the LEA was required to establish a school level PAC, although express provisions to this effect were not included in the Code of Federal Regulations. Further, the practice of LEAs appointing members of the PAC in accordance with existing regulations would no longer be permissible since the 1974 Amendments to the Title I statute require that the members be "selected" by the parents.

The existing federal regulations concerning parent involvement are generally divided into three components. The first component contains a statement of OE's policy regarding parent involvement, the second component consists of a series of requirements which LEAs must comply with in order to receive application approval. The final component contains authorization for SEAs to issue supplemental state rules, not inconsistent with federal requirements.

B. Organization of This Chapter

This chapter is divided into several sections analyzing the various components of the parent involvement provisions. First, we will analyze the scope of parent involvement and the role of parent advisory councils in the planning, implementation and evaluation of programs and projects funded under Title I.

Following this analysis, we will discuss the functions performed by PACs, PAC organization, PAC membership requirements, PAC budgets, i.e., allowable expenditures related to parent involvement, access to appropriate information, complaint resolution, and the existence of statewide PACs in several states included in our survey.

Finally, we will discuss the requirements that members of PACs receive sufficient training so that they may perform the functions described above.

C. Overview of Major Issues, Conclusions, and Recommendations

The Legal Standards Project offers several recommendations for the improvement of the Title I parent involvement requirements. They are specifically set forth in the main body of this section. An overview of the more important issues and recommendations, expressed in general terms, is presented below.

The current regulations include a section which sets forth OE's official policy regarding parent involvement. "Parent involvement at the local level is deemed to be an important means of increasing the effectiveness of programs under Title I of the Act." (45 C.F.R. §116.17 (o)(1)(1974)). For purposes of our analysis, the Legal Standards Project has adopted this basic premise. Thus, our basic research orientation in analyzing the existing parent involvement regulations and interpretations and additions was that parent involvement is an important means of increasing program effectiveness.

This is not to say that all state and local people we spoke with shared this basic premise. The attitudes toward parent involvement ranged from "parents are dummies" to "parents are key to good programs"

In several states additional comments concerning the concept and operation of parent involvement were made. To the extent they could be construed consistently with the basic premise that parent involvement can be an effective means of increasing program effectiveness, we have attempted to take these comments into consideration in fashioning our recommendations. A sampling of the range of attitudes expressed by SEAs is set forth below.

> 1. "There is a lack of sufficient LEA staff time to recruit parents."
>
> 2. "LEAs can't get 'good' parents to come to meetings. Thus, LEAs must recruit."
>
> 3. "Parents are apathetic. Can't get them involved."
>
> 4. "Some LEAs don't want parents involved. It is time-consuming and bothersome for the LEA staff."
>
> 5. "Some LEAs don't encourage parent involvement because they are afraid parents will over step their bounds."
>
> 6. "It is difficult for the SEA to ensure real parent involvement if the LEA is not committed to it."
>
> 7. "The parent involvement regulations are too oriented toward large urban districts. In small, rural districts, can't get enough people to form PAC."
>
> "In addition, major communication and transportation problems. Besides parents feel that the school board is elected and the school administration is paid to design and operate effective programs."
>
> 8. "PACs can't play an advisory role because Title I is 'too tied to the federal requirements.' "
>
> 9. "Parent involvement is one of the most important components to an effective program and parents serve as one of the most effective enforcement strategies where they are properly trained."

Set forth below is a summary of our findings and recommendations concerning parent involvement. First, we concluded that the specific activities constituting parent involvement in Title I are not defined in the federal regulations although it is clear that the PACs are advisory only and they must be involved in the planning, implementation, and evaluation of Title I programs. Only three of the ten states included in our survey have clarified in writing the specific nature of parent involvement with respect to each of the above stated responsibilities.

We recommend that OE require that the SEAs or LEAs explain, in writing, the nature and scope of parent involvement in the "planning, implementation and evaluation" of Title I programs with specific reference to the parent's role with respect to each Title I program requirement. These SEA or LEA guidelines would be required to be consistent with minimum standards to be set forth in the federal regulations.

Second, we found that several states employ a procedure whereby the PAC chairperson is required to sign a series of assurances as part of the LEA application. We recommend that OE amend the present regulations to require the use of such a procedure in lieu of the submission of information by the LEA demonstrating compliance under specified conditions. The more important conditions include:

- o the assurances are written in plain and simple language so that the parents know what it is they are signing their names to;
- o the assurances relate the nature of parent involvement with respect to each major responsibility, describing in specific terms the activities in which parents were involved.
- o the assurances indicate the specific documents and information which they received from the SEA and LEA and describe the nature of the training they received.

Third, we found that frequently only the materials specifically required to be automatically distributed to PACs were in fact distributed. We recommend that, in addition to the information automatically distributed to each PAC member, that each member receive relevant training and orientation materials and that the chairperson of the district PAC automatically receive, among other things, such additional materials as: comparability reports and worksheets, copy of SEA and OE monitoring reports, copy of GAO, SEA and HEWAA audit reports, LEA evaluation reports written in plain and simple language, all policy statements disseminated by the SEA to the LEAs, and copies of all substantive correspondence with OE and SEA. All of these documents must be furnished free of charge.

II. Defining the Scope of Parent Involvement

A. Introduction and Overview of the Federal Legal Framework

Since 1966, parent involvement has been considered a necessary component of a successful Title I program. An early OE handbook entitled, "Special Programs for Educationally De-Prived Children" (OE-35079) explained, "projects for educationally deprived children will have a greater chance of success if parents are involved to a far greater extent that they had been in the past." Program Guide No. 36, issued in 1967, required that each agency include "appropriate activities or services in which parents will be involved."

Program Guide No. 44, issues in 1968 reiterated the principle that parents should participate in the Title I program.

> The applicant should demonstrate that adequate provision has been made in the Title I program for the participation of and special services for the parents of children involved in the programs. The employment of parents in the Title I projects is but one way to implement this provision. The primary goal of such activities and services should be to build the capabilities of the parents to work with the school in a way which supports their children's well-being, growth, and development.

These early guidelines did not define the nature of the parental involvement.

The current Title I statute and regulations contains general expressions outlining the nature and scope of parent participation. The Title I statute provides that each LEA receiving funds under Title I must establish a district-wide PAC and school level PACs, each of which is responsible for "advising it in the planning for, and the implementation and evaluation of" Title I programs and projects (Section 141(a)(14)(C). The existing Title

I regulations generally require that: (1) parents be "consulted" and "involved" in the "planning", "development", and "operation" of the project (§116.17(o)(1); (2) the PAC has "reviewed" the evaluation of prior Title I programs and been "informed" of the performance criteria by which proposed programs are to be evaluated (§116.17(o)(2)(v)); (3) parents are to be "consulted" concerning services to be provided and ways in which parents can assist their children in realizing the benefits of the Title I program (§116.17(o)(2)(vi)); (4) the PAC has been given an "adequate opportunity" to "consider" the information available concerning special educational needs and the various programs available to meet those needs and make "recommendations" concerning such needs (§116.17(o)(2)(iv)); (5) the parents have "an opportunity to present their views," concerning the application to "appropriate" LEA personnel (§116.17(o)(2)(viii)) and (6) the PAC has "an opportunity" to submit comments concerning the application to the SEA. (§116.17(o)(2)(viii)).

A review of the underlined words in the above paragraph confirms the advisory nature of parent involvement under the Title I legal framework. In every state visited, the interviewees reiterated this basic notion. The guidelines in one state provide: PACs "are advisory in nature. These guidelines shall in no way be construed as giving any advisory committee veto power over Title I projects or activities". In a second state, the chairperson of the PAC must sign an assurance which reads, among other things, that "the parent advisory council is aware that it serves only in an advisory capacity ...".

The important question remains as to how the individual states have interpreted the scope of this "advisory" responsibility and the methods used to ensure compliance with the PAC requirements. The state interpretations defining the specific functions performed by PACs appears *infra*. at p. 759 . A discussion of the policies adopted by a number of SEAs for ensuring that the appropriate school officials have, at a minimum, complied with the general requirements cited to above is presented below.

B. PAC Assurances

1. State Legal Framework

One policy developed by several SEAs is the use of PAC assurances, whereby the chairperson of the PAC is required to certify in the Title I application that the PAC has been involved in the "planning, implementation, and evaluation" of the Title I program according to law. The specific aspects of the certification procedure and the purpose of this procedure differ from state to state. The state policies will be discussed below.

In one state the application contains a page which recites the language of the parent involvement requirements as set forth in the federal regulations. At the bottom of the page are two blank spaces. If the chairperson signs in the space indicating that the requirements of the regulations have been met satisfactorily, and no independent information is received to the contrary, the SEA will assume that the LEA has complied with the parent involvement requirements.

If the chairperson signs in the space indicating that the requirements have not been met satisfactorily, the SEA "will initiate an investigation to determine whether or not the district is in compliance with the regulations." If the Department of Education determines that the district has not complied with the regulations, the district will be so advised, and "no project for the district will be approved until" such time as the SEA determines that the district is in compliance. If the SEA determines that the LEA has in fact complied with the regulations, it will approve the application, notwithstanding the PAC's allegations.

A second state's application provides for the signature of the chairperson to a series of PAC assurances concerning the level of PAC involvement in program formation and PAC approval or disapproval of the final product and contains a space for the inclusion of any minority opinions of the council. In reviewing an application containing a minority opinion, the state's written materials explain that it is the SEA's responsibility to "consider this opinion as part of its overall review responsibilities." Further the state has written in a memorandum that when minority opinions are expressed, the school district "must provide a written response to them. Also it would be helpful if the school district responds in writing to any other negative comments made on this page."

In a third state in which the application contains a series of general assurances which the chairperson of the District and School-level PACs must sign, the state's written materials also explain that the chairperson of the school-level PAC must sign an assurance attesting to the participation by the PAC in each phase of the planning process. Furthermore, the State Guidelines provide that the chairperson must sign all requests for amendments and revisions of the project.

In a fourth state, the PAC certification includes, among other things, an assurance that the PAC "has been involved in all phases of planning, needs assessment, setting of objectives and goals, program implementation and procedures, budgeting implications, program evaluation, and dissemination or program informational data to the community" and an assurance that school level PACs have been established. Apparently this set of assurances is signed by the District PAC chairperson.

The above discussion explains how the certification procedure works in four states. An equally important consideration concerns how this authority relates to the language in the regulations (as discussed in detail infra.) that each LEA must include in its application "sufficient information" to enable the SEA to determine whether the LEA has complied with the various parent involvement requirements.

In other words, do the PAC assurances constitute sufficient information to enable the SEA to determine compliance with the requirements?

In the first state referred to above, the PAC assurances are basically used in lieu of the inclusion of specific information concerning compliance with parent involvement requirements. In the third state described above, the SEA application generally requires the submission of information from which it can determine whether the LEA has complied with each and every parent involvement requirement in addition to the PAC assurances.

2. Policy Analysis and Recommendations

The above discussion raises two related issues. First, is the policy of utilizing PAC assurances (certification procedure) in lieu of the submission of specific information consistent with the language of the current regulations which require that the LEA, in its application submit "sufficient information"? If the policy is inconsistent with the current regulations, should the regulations be modified to permit such a policy?

It is our conclusion that the use of assurances especially PAC assurances, in lieu of specific information submitted by the LEA is inconsistent with the current regulations. Where OE does permit the use of an assurance in lieu of specific information, such a policy is expressly stated in the regulations. For example, Section 116.23 provides that each application "shall provide assurance" that the LEA will render to the SEA an annual report. In promulgating the PAC regulations, OE use the term "sufficient information".

The Legal Standards Project recommends that the regulations be amended to permit such a policy under the conditions described below.

First, the District PAC chairperson would be required to certify to the extent of parent involvement in the planning of the Title I program by identifying specific PAC recommendations and objectives relating to e.g. program design, needs assessment, concentration, and targeting of children and by stating how such recommendations and objectives were taken into account.

Second, the certification must describe the extent of parent involvement with respect to implementation and evaluation of the Title I program by stating the functions individual parents or PACs will be performing, the responsibilities they have been given and the LEA decisions requiring their advice.

The Project's specific recommendations concerningPAC responsibilities with respect to "planning", "implementation" and"evaluation" are set forth *infra*. at pages 759-769.

These certifications must be written in plain and simple language easily understood by the parents. For example, in certifying that §116.17(o)(2)(viii)) of the existing regulations has been complied with ("all parents of children to be served have had an adequate opportunity to present their views concerning the application to the appropriate school personnel") the District PAC chairperson would be required to answer such questions as:

- How many days in advance of the date the application was due for submission to the SEA were you provided with to review the draft application?
- Did you make any recommendations? If so, were your recommendations reflected in the application? If not, why not?
- Were you involved in the actual drafting of the application or is this the first time you actually saw the draft?

The third change in the legal structure concerns the sufficiency of PAC training and the nature and types of documents automatically furnished to the PACs and the clarity and simplicity of such documents. If the SEA is going to rely on the PAC to assure LEA compliance, the PAC must be sufficiently well trained (infra.) and must be furnished sufficient information concerning the other Title I requirements before it can certify that it has been involved in the "implementation" and "operation" of the Title I program (see infra.). Thus, it would be necessary to amend the present and proposed regulations to require that the certification also indicate in plain and simple language that a comprehensive plan for the training of PAC members will be implemented according to a specified schedule and performance objectives, an evaluation format, and budget for the training are specified. Furthermore, the specific documents and information received from the SEA and LEA are described.

Fourth, the certification procedure applies to substantive changes to the proposed plan and budget which are included in LEA amendments and revisions submitted by the LEA to the SEA. OE might adopt the language of a regulation issued pursuant to the Emergency School Aid Act (45 C.F.R. §185.41(g)(1974)) which provides:

> No amendment to the program, project, or activity of a local educational agency shall be approved, and no additional funds made available under the Act, unless the districtwide advisory committee has been consulted and involved in the development of, and has been given an opportunity to comment upon, such amendment or an addition to the program, project, or activity.... Amendments or additons suggested by the districtwide advisory committee shall be forwarded by the local educational agency, with or without comment... .

Fifth, the LEA must attach to the application a copy of the minutes of PAC meetings.

Finally, a written procedure is in force and attached to the application explaining the action to be taken in the event the PAC does not sign a certification on the Title I application or any amendment.

This recommendation is based on two premises. First, there is a greater likelihood that a person who might normally sign a series of assurances phrased in legal terms without first reading the assurances, will not sign such assurances if (a) he/she were properly trained (i.e., understand the Title I legal framework and his/her responsibility related thereto) and (b) the assurances were phrased narrowly and in an understandable form.

For example, a person might sign an assurance that "I participated in the implementation of the Title I program pursuant to relevant Sections of the regulations." However, the same person would most likely not sign an assurance which states that "I visited the Title I program three times last year", unless he/she actually visited the program.

Second, to the extent that the person actually reads and understands the assurances, i.e., he/she takes this responsibility seriously, there would appear to be a greater likelihood that the LEA will take its responsibilities seriously, knowing full well that if the chairperson refuses to sign the assurances, the SEA might refuse to approve its application.

If any of the conditions suggested above are not fully adopted, we would recommend that OE not modify the existing legal structure to permit the use of a PAC certification procedure in lieu of the submission of specific information by the LEA. Instead, we would recommend that the certification procedure be used in addition to the submission of "sufficient information" by the LEA. Note that the SEA not the PAC, is still ultimately responsible for determining compliance with the PAC requirements.

C. Minutes of PAC Meetings

A second policy pursued by several SEAs, as an aid for ensuring that recommendations made by parents are considered by the LEA, is to require that the LEA either attach to its application or maintain a record of the minutes of the PAC meeting wherein such recommendations were made.

Two states which do not provide for PAC sign-off authority, require that copies of the minutes of all meetings be attached to the applications. A third state which does provide for sign-off authority, also requires that the minutes of the PAC meetings at which a motion was passed containing recommendations regarding the project be attached to the application.

As stated above, we recommend that the LEAs be required to attach copies of the PAC minutes to their Title I applications.

III. The Functions Performed By PACs (District and School Level)

A. Introduction

The above discussion described in general terms the scope of the parent involvement requirements and some of the methods used by SEAs as aides for ensuring compliance with the parent involvement requirements. The following discussion describes and analyzes some of the state interpretations of these general responsibilities set forth in the Title I regulations as they relate to both the district PAC and the school level PAC.

However, before we describe some of the specific responsibilities performed by the district and school level PACs, we will describe how several states have attempted to define the specific responsibilities of the two PACs.

B. Division of Responsibility Between the District and School Level PACs

1. State Legal Framework

The existing PAC regulations do not distinguish between the functions performed by the district and school level PACs since the existing set of regulations were issued prior to the 1974 Education Amendments which added the requirement that school-site PACs be established. Similarly, the March 11, 1975 proposed regulations, issued in part to implement the 1974 amendments, do not draw a distinction between the two levels, possibly because the Title I statutory provision draws no distinction. The question remains whether such a distinction should be made.

Several states have attempted to explain the respective roles of the district and school level PAC. In one state, the SEA explains the division of responsibility in the following manner. The district PAC "must focus its attentions on the districtwide Title I program. Its study, review and recommendations must be based on student needs in all schools eligible for Title I funds and services. Program priorities must be based on what is best for those children who have the greatest needs, regardless of which of the eligible schools they attend."

"On the other hand, building PACs are concerned more with youngsters who receive Title I services in their school. Their concerns are focused, as they should be, much closer to home. They ask questions as: 'What help do our children need?' 'How well are they doing?' 'How can we best help them'."

A second state has extensive written materials explaining the role of the PACs. In general, the district PAC responsibilities include: (a) development of a district plan, including a time line identifying key events, (b) participation in the district needs assessment, (c) establishing goals and objectives, (d) identifying resources available in the district; and (e) acting as a hearing board for any individual or group that may want to propose additions to or changes in the school districts compensatory education program. The school level PAC responsibilities include (a) participating in the processes of needs assessment and the setting of goals and objectives, (b) advising staff and principal regarding staff development and inservice training, (c) arranging with the principal and the staff for direct parent involvement in classroom activities and program evaluation, and (d) advising the principal and staff regarding comprehensive parent education.

2. Policy Analysis and Recommendations

We recommend that OE, based on an analysis of LEAs' experiences under the 1974 Amendments requiring both a district and school level PAC, study the need for delineating the respective roles between the two PACs. We are not in a position to make a specific recommendation at this time although logic suggests that confusion in roles would be reduced if responsibilities were clearly specified.

C. Specific Functions Performed By PACs

1. Introduction and Overview of Federal Legal Framework

As stated *supra*., the statute and the regulations generally require that PACs be involved in the "planning", "implementation", and "evaluation" of Title I projects and programs. However, the regulations do not spell out how this involvement should take place. The few specific PAC functions set forth in the regulations include:

- o Review and commenting of the Title I application (§116.17(o)(2)(viii)) and evaluation (§116.17(o)(2)(v)); and
- o Making recommendations concerning which specific educational needs should be addressed by the programs (§116.17 (o)(2)(iv)) and which services should be provided to their children to meet their needs. (§116.17(o)(2)(vi)).

In the previous section we described one state's interpretation of these general terms. This segment of the paper will describe the policies developed in this and several other states.

2. State Legal Framework

In one state, the PAC sign-off provision includes, among other things, an assurance that the PAC "has been involved in all phases of planning, needs assessment, setting of objectives and goals, program implementation and procedures, budgeting implications, program evaluation, and dissemination of program informational data to the community".

The nature of the PAC's involvement in certain of these areas is explained in training handbooks prepared by the SEA staff for use by the PACs. For example, with respect to its involvement in the needs assessment requirement, the state materials provide that the PAC may participate

- o by helping to plan the process,
- o by helping collect the data and
- o by helping the district staff evaluate the information gathered.

With respect to program design, the state's materials explain that three activities must be completed and should be given careful PAC consideration as inputs to project design: (a) the evaluation of past project activities; (b) needs assessment, and (c) identification of eligible schools. "The PAC should discuss and negotiate proposed project changes with district staff early enough to permit the orderly adjustment of staff assignments and other project matters."

With respect to evaluation, "PACs can help in the evaluation by: looking at previous years evaluations to see if the right questions were asked, reviewing other districts' approaches to Title I evaluations, reviewing the educational goals of the present project to make sure they are reasonable and appropriate to children's needs and to the services being provided, and studying the completed evaluation and recommending changes in the following year's program.

Several states have expressly interpreted the requirement that PACs be involved in the "implementation" of the Title I program to permit PAC members to conduct on-site visits.

In one state, the training materials prepared by the SEA for the PACs suggest that PACs should have "active involvement" in any USOE or SEA monitoring of the LEA program. The materials also state that "although Title I monitoring is not a specified responsibility of the PAC, it is a good way for PAC members to see how regulations apply to the program and it gives early warning of emerging problems".

In another state the SEA prepared monitoring instrument asks, among other things, "is there a record that the advisory council has been involved in...on-site visits."

In a third state, the training materials provide that "monitoring by parents can be an important part in helping the school district to meet its responsibilities." The training materials provide parents with procedures for monitoring and a PAC questionnaire for use in visiting Title I classrooms.

During our interviews in the ten states includes in our survey, we inquired whether the SEA had expressly clarified the federal requirement that the PAC be provided with "an opportunity" to review the project application. The persons interviewed all explained that no express policy had been established. One state Title I Director explained that one week would be sufficient. A second state wrote, in response to a general inquiry by a PAC chairperson regarding supplying the PAC with necessary information that "this is a local district matter."

3. Policy Analysis and Recommendations

Nothwithstanding the clarifications of the general terms "planning", "implementation" and "evaluation" included in written material prepared by the three states described above, the remaining states have added little written clarifications in spite of the express authority contained in the federal regulations to establish additional rules which are necessary to insure the involvement of parents.

Presently, OE takes the position that beyond the express duties set forth in the federal regulations explaining the PACs general duties (supra.), "the functions of the council should be decided jointly by members of the council and the local school administrators." (Title I: How It Works at P. 25).

We recommend that OE require that the SEAs or LEAs prepare guidelines clarifying these general terms, consistent with minimum standards presently set forth in the federal regulations and those proposed below.

This technique of drafting a regulation establishing nationwide minimum standards and then requiring the state to issue the precise guidelines is widely used by OE (see e.g., 45 C.F.R. §100b.104). This approach accomplishes two purposes. First, it ensures a minimum degree of conformity with the stated objective of meaningful parent participation. However, it allows the state or LEA the discretion to draft the language in a manner consistent with local circumstances which cannot be recognized on a national level.

The specified regulation might contain the following introductory clause:

> the State or Local Educational Agency shall establish written policies specifying the scope and nature of the parent advisory council's involvement in the planning, operation, implementation, and evaluation of Title I programs and projects, which state policies shall provide for, as a minimum, the following:

Specifically, we recommend that with respect to "planning", active involvement would include, for example, PAC participation in:

- the selection of project areas and program participants, consistent with federal guidelines;
- a review of the prior year's evaluation (the evaluation must be written in plain and simple language; the submission of tables and graphs without sufficiently clear explanations is unacceptable);
- conducting the needs assessment;

- analysis of the assessment for purposes of establishing program goals and objectives;
- the designing of the program;
- the establishment of program objectives and
- review of the application prior to submission. The time necessary for such review will vary depending on the actual involvement of the PAC in the drafting of the application. At a minimum, the PAC chairperson should have sufficient-lead time to call a PAC meeting, make suggestions to the LEA and negotiate changes in the application prior to the submission deadline.

With respect to parent involvement in the "operation" and "implementation" of Title I programs, we recommend that the federal regulations require that the state or local guidelines provide, at a minimum, that the LEAs specify the specific activities which PACs may engage in, including, for example, visiting Title I classes, programs or activities for the purpose of reviewing the quality of the program (not the quality of the teacher), participating in the official SEA and USOE monitoring visit as a monitor, recruiting parent volunteers, serving as a school-community liason and generally informing parents concerning the Title I program. In addition, the state or local guidelines would require that the LEA appoint or identify a person on its staff possessing sufficient authority with whom the PAC may communicate its observations, compliants, and suggestions; that the PACs be involved in any decision related to a request for modification or revision of the Title I application or a waiver request by an LEA from state rules; and with respect to evaluation, that the PACs be involved in the design of the evaluation instrument, including the decision concerning the objectives of the program, the standards, used, and the criteria for determining success. (national v. local). The evaluation must explain in terms understandable to the average PAC member whether the program was successful and if not successful, include possible explanations.

The final issue concerns whether OE should establish a specific time by which the LEA must submit its application to the PAC for comments. To the extent that the PAC is actively involved in every state of the design of the program, its actual "review" may be pro forma, necessitating a short period of final review to ensure that the actual application reflects previous agreements. Thus, the establishment of a specified period may not be appropriate.

We recommend that the requirement that the PAC has had an "opportunity to present their views concerning the application" be amended to include the concept that the PAC must have had a reasonable opportunity to review an application prior to the time it is submitted to the SEA. A "reasonable opportunity means, at a minimum, that the PAC chairperson can call a meeting at which point the PAC can consider it and the LEA has time to consider the suggestions and make appropriate changes. What is considered a "reasonable opportunity" will vary, depending on the circumstances of the PACs actual involvement in the drafting of the actual proposal. In those situations wherein the LEA actively involves the PAC in the design of the program, actual acceptance may be *pro forma*, necessitating a shorter period of time than if the PAC has never seen the actual proposal and has no idea of its contents prior to its submission for comment.

In the latter situation, the LEA would be required to submit its proposed application to the PAC well in advance of the time it is due for submission to the SEA; otherwise there would be no time to revise the proposal pursuant to the PAC's suggestions. Such a practice would not constitute meaningful parent involvement.

IV. PAC Organization

A. Introduction and Overview of Federal Legal Framework

Although few states have issued their own rules clarifying the PAC responsibilities generally set forth in the Title I regulations, a number of states have taken advantage of the authority expressly given to it to "establish such additional rules and procedures, not inconsistent with the provisions of this section, as may be reasonably necessary to insure...the proper organization and functioning of parent councils. (§116.17 (o)(3)).

Before reviewing various state additions and interpretations, it should be noted that the Title I statute and regulations contain no guidance concerning PAC organization, with the exception of the provision set forth in §116.17(o)(2) that an LEA "may designate an existing organized group" as the PAC. (Note that the proposed regulations have deleted this option.) However, suggestions regarding such organization are contained in a handbook entitled: Parent Involvement In Title I ESEA, Why? What? How? (OE Publication No. (OE) 74-07105). This handbook provides, among other things, that "like any other formerly constituted group, the parent council must have an organizational structure" (p. 10). "Ideally, the council chairman should not be an employee of the LEA". (p. 10) A second OE Publication entitled: Title I ESEA: How It Works - A Guide for Parents and Parent Advisory Councils, provides that "the organization of a parent council is entirely up to the council." (p. 24)

The following discussion of state interpretations and additions to PAC organization requirements will be divided into the following six areas: (1) existence of formal bylaws; (2) existence of minutes to meetings; (3) PAC as a subcommittee of PTA or other existing parent organization; (4) election of officers, (5) scheduling of PAC activities and meetings; and (6) establishing formal channels of communication with the school board.

B. State Legal Framework

1. Bylaws

In the two states which have repeatedly been referred to above which have strengthened and clarified the PAC requirements, it is a requirement that the PAC be an officially constituted organization with written bylaws. This is not to say that these states would prohibit a PAC from being a subcommittee of an existing PTA organization so long as such a subcommittee complies with the state and federal requirements pertaining to parent involvement, including the selection of membership, and so long as it has its own bylaws.

2. Minutes

In a number of states, the LEA must either keep the minutes of PAC meetings on file or attach them to the application. As stated supra., these minutes are used by the SEA to determine the degree of actual parent involvement.

3. Scheduling of PAC Activities and Meetings

In addition to the requirement that in certain states the LEA must either maintain on file or attach to their application the minutes of PAC meetings, one state also requires that the LEA list in its application a schedule of significant activities for the preceding year and a proposed schedule for the current year. In several states the LEA must include in its application or maintain records of the number of meetings scheduled in prior years and the number of meetings to be scheduled. However, based on the state materials reviewed, no state has established a minimum number of meetings which must be scheduled in a given year.

4. Election of Officers

With respect to the election of PAC officers, including the PAC chairperson, several states have issued minimum criteria, although a majority of states apparently leave the matter totally to the discretion of the LEAs. For example, the regulations in one state provide that "no employee of the LEA may serve as a voting member. Title I administrators, teachers, and aides should be represented as non-voting members of the PAC. Each PAC shall elect its own chairperson and such other officers from the voting membership as the membership deems appropriate."

In a second state, the present application form contains the following directive: "the council chairperson cannot be a project staff member or a school offical".

In a third state, an LEA issued a rule, which was upheld by the SEA, that the chairperson's tenure shall be limited to two consecutive years.

5. Channels of Communication

Finally, it should be noted that two states have developed official written policies concerning the formal relationship between the PAC and the school district, including the establishment of official lines of communication. Based on our interviews, it appears that the first state's written policy was developed to prevent the PAC from over-reaching its authority whereas the second state developed the policy to increase the effectiveness of the PAC's involvement.

In the first state, in which the application contains a series of assurances which the PAC chairperson must sign, one clause reads, "the Parent Advisory Council is aware that it serves only in an advisory capacity and that the Council reports directly to (check one): the local school board, the school principal, the school superintendent, or the local director of federal programs.

In the second state, the written materials concerning PAC operating procedures provide, among other things, that the PACs operate by "establishing regular two-way communication channels with the school administration..." The state guidelines provide that:

> the school district shall make sure arrangements and initiate such procedures as are necessary to ensure that the advisory committee has adequate opportunity to communicate directly with the governing board of the school district and to assure the advisory committee that the board will consider suggestions and recommendations.

C. Policy Analysis and Recommendations

As stated supra., the OE handbook entitled Parent Involvement in Title I, ESEA - Why? What? How? states that "like any other formerly constituted group, the parent council must have an organizational structure." The first question with respect to PAC organization is whether the Title I regulations should also reflect this informal OE position. A second OE handbook entitled, Title I: How It Works - A Guide for Parents and Parent Advisory Councils quoted supra., provides that the "organization of a parent council is entirely up to the council". Should this informal OE position be incorporated into the officially promulgated OE regulations? The state's included in ours sample have adopted such additional requirements as: PACs must have bylaws, official minutes of the meeting must be kept on record and/or attached to the application, PAC officers cannot be employees of the LEA (the OE handbook provides that ideally, the chairperson should not be an employee of the LEA), proposed PAC activities and meetings should be planned at the end of one fiscal year for the next fiscal year and such plans included in the LEA's application, and formal channels of communication should exist between LEA and PACs. Should any or all of these provisions be included in the federal regulations?

We recommend that OE incorporate the informal pronouncements into its regulations as official policy. The state requirements set forth above are natural concomitants to these policies. Thus, as a formerly constituted organization, the PACs should have bylaws, written minutes, and plans for subsequent years.

The inclusion of the restriction requiring the election of non-employees as officers reflects the ever-present concern that the PAC will be an LEA "rubber stamp". However, this provision and the LEA requirement limiting the tensure of a PAC chairperson may significantly limit the effectiveness of the PAC, especially where such persons have been vocal in support of parent participation. We recommend that such limitations be left to the discretion of the PAC membership, not the LEA.

With respect to the establishment of channels of communication between the PAC and the LEA we recommend that the second state's policy be adopted on a national level. It is important that the PAC members know who they can communicate with and that such person has the authority to deal with their concerns, comments, and complaints.

V. PAC Membership

A. Introduction and Overview of Federal Legal Framework

The 1974 amendments to Title I (P.L. 93-380) made several changes concerning, among other things, parent advisory council membership requirements. Section 141 (a)(14) generally provides that the district-wide PAC and the school level PACs (new) must each (a) have "as a majority" of its members "parents of children to be served", (b) be composed of members "selected by parents." Thus, the requirement presently set forth in the Title I regulations that the PAC will have "more than a simple majority" has been superseded by the statutory language quoted above i.e., each PAC will now have "as a majority of its members, parents of children to be served". Furthermore, the pre-1974 requirement that the PAC must be composed of parents of eligible children has been superseded by the statutory requirement that PACs must be composed of a majority of parents of "children to be served."[226/] Finally, the statute adds the requirement that PAC members must be "selected

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[226/] This 1974 change has once again been amended, pursuant to the Education Amendments of 1976 to read, "children eligible to be served".

by parents". Set forth below is a discussion of state interpretations and additions to these PAC requirements.

In correspondence with a Senator, OE, subsequent to the enactment of the 1974 Amendments explained, among other things, the limits of LEA discretion concerning PAC membership:

> The local educational agency's responsibility to establish Title I advisory councils includes, of course, the procedures for the nomination and selection of parents for the advisory councils, but the actual selection of such parents must, in accordance with Section 141(a)(14), be made by parents... .

In other words, OE has expressed the position that the LEA may establish procedures concerning the selection process, but in no way regulate the actual selection of individuals. The actual selection must be carried out by the parents.

B. State Legal Framework

1. Meaning of the Terms "Majority" and "Select"

The Title I statute, pursuant to the 1974 Education Amendments, provides that the councils must have "as a majority of its members parents of the children to be served."

A second aspect of the 1974 statutory amendments concerns the meaning of the term "select". Prior to 1974, it appears that the practice in some states was for the school district to appoint members to the PAC. Although such a practice would clearly be illegal under the 1974 amendments, i.e., PAC members must be "selected by parents, "the questions remain regarding the meaning of the term "select" and whether the SEA or LEAs may regulate the nomination or eligibility criteria.

Several states have written guidelines suggesting the composition of the "minority" and their voting status. For example, one state's regulations provide that "the balance of the voting membership of each PAC shall be selected by parents and may include representatives of non-served schools, non-public schools, and groups such as social and health service agencies, business and industry, and community groups. The state regulations also provide that "at least one representative from the local education agency shall serve as an ex-officio member of each PAC. No employee of the local educational agency may serve as a voting member. Title I administrators, teachers and aides should be represented as non-voting members of the PAC."

A second state, in a memorandum to several LEAs has written that the SEA has said, "only parent members of a council may be considered as voting members of that council".

A third state, in its instructions for LEAs concerning the completion of their applications has prescribed the composition of the PAC.

> A majority of the voting membership of the District Advisory Committee shall be parents (not employed by the district) of students eligible for categorical services. The District Advisory Committee shall be composed of each of the following:
>
> (1) Parents who reflect the ethnic and socio-economic composition of the district (Parents of students in all age spans should be included);
>
> (2) Representatives from non-school community social service agencies such as mental health groups, United Crusade boards, or city connected agencies;
>
> (3) Representatives from the business community, such as store owners, managers, or supervisors;
>
> (4) Classified aides, teacher assistants, or other support personnel;
>
> (5) Teachers and administrators receives, or in competing for;
>
> (6) Representatives of non-public schools when categorical resources are available to non-public schools.

> If individual members represent more than one of the above groups of people, the total membership may be reduced accordingly. Also, other representatives may be added as long as parents not employed by the district remain a majority.

In two states, the interviewees stated that "whatever 'select' means, it no longer means appointed by the school district".

These states, and most of the other states included in the sample have interpreted the word select to mean either "elect" or "select", at the option of the LEA. As one interviewee stated, "local discretion in this regard is complete within the perameters of the federal requirements". In some states, the application simply requests that whatever method is finally decided upon, it be described in the application.

In two of the states included in the sample, the SEA staff interviewed expressed the opinion that the word "select" means elect.

2. Composition of the District PAC

The third aspect of the 1974 Amendments which has been the subject of some interpretation by the states concerns the composition of the district PAC. The Title I statute simply provides, as stated above, that it be composed of members selected by the parents in each school attendance area and have, as a majority, parents of children to be served. The proposed regulations (§116.a.25(e)) provides that the LEA may provide that the districtwide PAC will be composed solely of members of school councils.

One state, in a letter to a LEA expressed the position that, "it is expected that the district-wide PACs be made up of representatives from each of the building level PACs." A comparable position appears in a second state's application instructions.

3. Penalities for Non-Compliance

The above discussion has primarily focused on the state's interpretations and additions concerning the PAC membership requirements. One state has issued regulations prescribing what happens if the LEA fails to comply with such membership requirements. Set forth below is the state's policy.

> (2) If, at any time, the superintendent of public instruction shall have reasonable cause to believe that a PAC is not representative of parents of children receiving Title I services and/or that there was otherwise a substantial abuse of the election process for the current PAC, then the superintendent shall conduct such investigation as is deemed necessary. In the event the superintendent shall thereafter determine that such violations are actual or most probable, the superintendent shall order and monitor the implementation of such remedial action on the part of the local education agency as the superintendent may determine necessary to bring the PAC into compliance with the intent of applicable state and federal guidelines and rules. Reasonable cause to believe that there may have been a violation contemplated by this section may be established pursuant to the supertendent's review of program application and related documents, site monitoring of LEA projects, and/or the written complaints of parents of children receiving or entitled to receive Title I srrvices which explain the time, date, place, and nature of alleged violations. For the purpose of this section, remedial action may include, but is not limited to, a revision of the composition or an election of the PAC.
>
> Compliance with the remedial action ordered by the superintendent shall be a condition to the further disbursement of Title I funds to the LEA for the then current and future fiscal years.

4. PAC Membership Requirements and the Buckley Amendments

The "Buckley Amendments" to the General Education Provisions Act (also known as the Family Educational Rights and Privacy Act) prohibit the dispersal of federal funds to any educational agency or institution which has a "policy or practice of permitting the release of students' educational records" or other personal information without the written consent of their parents. (Section 438(b)(1) of GEPA (20 U.S.C. 1232g), as amended by P.L. 93-380 §513(a)).

The Title I statute requires that a majority of members of the parent advisory committees consist of parents of educationally deprived (eligible) children. Because the identification of parents of educationally deprived children necessarily involves the identification of those children themselves, the PAC selection procedure reveals personal information about students. Therefore, the identification of parents of educationally deprived children falls within the privacy constraints of the Buckley Amendments, i.e., it requires written parental consent.

Under current federal regulations, the identification of parents for PAC selection would proceed as follows:

First, each educational agency or institution must adopt a policy of recordkeeping and disclosure consistent with the requirements of the act (45 CFR §99.5). Under the Amendments, "school officials" are exempt from obtaining the prior consent of parents when in the pursuit of "legitimate educational interests". Thus, each educational agency or institution must also define the criteria used in determining who are "school officials" and what are "legitimate educational interests".

Since school officials responsible for PAC coordination are presumably "school officials" for purposes of the Buckley Amendments, and further, since PAC selection is presumably a "legitimate educational interest", such officials would have access to lists of eligible children without prior parental consent.

Second, current regulations (45 CFR §99.30(a)(2)) also authorize disclosure of student information to the students' parent(s) without prior consent. Therefore, school officials may permissibly disclose the eligibility of children to their parents in an effort to obtain parental consent for the further release of that information in the PAC selection process.

Third, in order to identify parents of eligible children for PAC selection, their written consent is required (45 CFR §99.30(a)(1)). Moreover, a parent is presumed to have authority to give such consent (45 CFR §99.30(b)). Minimally, the written consent must include:

> 1. A specification of the records to be disclosed;
>
> 2. The purpose or purposes of their disclosure; and
>
> 3. The party or class of parties to whom the disclosure may be made (45 CFR §99.30(c)).

Absent such written consent, the release of the names of parents of eligible children to the parents responsible for PAC selection is impermissible.

Finally, in response to the above described framework, OE proposed regulations contain the following directives which focus on PAC selection:

> In consultation with the district advisory council, the local educational agency shall establish appropriate procedures whereby parents of children who are currently participating or who will be participating in the proposed project be identified so that they may be considered for membership on a school, intermediate, or district advisory council. In no case may parents be identified, for the purposes of this section, unless they have first given their consent to be so identified.

Thus, the district PAC and LEA are jointly responsible for developing specific procedures for PAC selection, provided those procedures are consistent with the general federal requirements. For example, standardized consent forms might be developed, and a mail or telephone campaign initiated for contacting parents.

Essentially, the Buckley Amendments will create a pre-selection process, since those parents who do not wish to become PAC members are likely to withhold their consent. In itself, this pre-selection should create few problems beyond the obvious and minimal administrative ones. However, in those areas where school administrators dislike PACs, the parental consent required by the Buckley Amendments might serve as an instrument of sabotage, e.g. through discouragement of parent involvement in the solicitation of consent by school officials.

C. Policy Analysis and Recommendations

The above discussion raises several issues. The first issue concerns the meaning of the terms "select" and the composition of the minority with special attention focused on the locus of responsibility for defining these terms. As stated above, the Title I statute, the existing regulations, and the proposed regulations do not define the term "select" nor do they prescribe the composition of the "minority". However, several SEAs explained that the meaning of the term "select" should be left to the discretion of the LEA. In addition, several states mandated the composition of the PAC minority. Further, one SEA allowed an LEA to regulate which parents were eligible for membership.

We recommend that the federal regulations clearly indicate that the PAC is responsible for interpreting the term "select" and similarly, the PAC is responsible for selecting the composition of the entire PAC, including the minority.

These amendments would also work to mitigate against the existence of a "rubber-stamp" committee since the parents would be responsible for defining how the composition of the PAC is to be determined and who is to be included.

With respect to the composition of the district PAC, once again we recommend that the decision be made by the parents in project areas.

VI. PAC Budgets (Allowable Expenditures)

A. Introduction and Overview of Federal Legal Framework

A key issue facing any organization is the level of financial support it can expect to receive. The Title I statute and Title I regulations make no mention of whether the LEA application must include a PAC budget and what constitutes allowable costs for PAC activities. The regulations implementing the General Education Provisions Act and the appendices attached thereto generally require that costs be "reasonable" and "necessary" (see 45 C.F.R.§100b.81 and appendix B.). The OE handbook entitled: Parental Involvement in Title I ESEA - Why? What? How? (DHEW Publication No. (OE) 74-07105) provides, in part, that "in justifying the expenditure of Title I money for parent councils, the basic consideration should be the facilitation of proper functioning of the group and avoidance of hardships that would otherwise be imposed on members of the council if the proposed expenditures were not authorized. Any expenditure of Title I funds must be included in an approved budget, and proper documentation must be available to justify each expenditure " (at p. 12). The handbook also specifies certain costs which would be allowable and others which would not be appropriate, e.g. reimbursement for loss of work to attend meetings would not be an appropriate expense.

In correspondence with an SEA, OE addressed the question of allowable use of Title I funds to pay for support staff hired by the PAC. Specifically, the SEA requested advice as to "whether or not funds provided under Title I could be used to pay the cost of certain attorney's fees?" The services provided were limited to action taken on behalf of the Title I PAC to remove from a court order stipulations that would have prevented the council from carrying out its lawfully mandates functions.

OE concluded that if the SEA finds that the school district

> authorized the services provided for the purposes indicated...and has paid him a reasonable amount for the services he rendered that the cost of those services is allowable in accordance with 45 C.F.R. §100b.81 (see Federal

Register of November 6, 1973, p. 30681 and p. 30697, item 16, legal expenses), then Title I funds may be used to reimburse the school district for the amount of that payment.

B. State Legal Framework

1. Minimal Level of Financial Support

The SEAs' policies concerning PAC budgets varied widely from state to state. Although all states allowed monies to be budgeted for certain PAC activities, it appeared that certain states placed more (or less) emphasis on the "adequacy" of the PAC budget.

In one state in which the Title I Director referred to PAC parent members as "dummies", the director stated that if an LEA ran short of Title I money it was acceptable that no money be budgeted for PACs. In a second state, which places great importance on meaningful parent involvement, the Title I Director stated that if no money were budgeted for PACs, he would certainly inquire as to reasons why no amount was included.

Regardless of a particular state's attitude toward parent involvement, it does appear that in most states the final budgetary decision rests with the LEA, so long as the decision is not clearly arbitrary. Even in some of the states which stress parent involvement, there apparently are no state policies concerning what constitutes a minimum acceptable level of financial support nor a description of the circumstances under which an LEA could totally deny financial support to a PAC.

There are at least two states, however, in which it appears that, absent unusual circumstances, the application would have to include a reasonable budget or the application would be disapproved.

In a state memorandum written in 1975 and disseminated to all LEAs, the section concerning parent involvement provides, in part, that "budgets for parent involvement activities is encouraged." Furthermore, since the state's officially promulgated regulations provide that the LEA "is required to provide training opportunities for members of the advisory committees," it would appear that, at a minimum, monies for training must be included in the PAC budget. In a second state, an SEA training manual for PACs provide that the PAC budget should include sufficient funds for at least the following activities: travel to workshops, babysitting costs, costs for materials and supplies needed to prepare reports and minutes of meetings, and cost of clerical assistance.

2. Allowability of Expenditures for Staff Support

It has been stated by various parent groups that one reason PACs are, in some cases, LEA "rubber-stamps" is because the primary technical assistance and staff support is provided by the LEA. Thus, one question asked during our interviews concerned the allowability of an expenditure for staff support, so that such staff were not employed by the LEA. The responses varied from state to state. The consensus seemed to be that if the LEA staff could provide reasonable expertise to the PACs, it was appropriate for the LEA to deny a budget request for an outside consultant. This rationale is analogous to OE's rationale concerning the use of Title I monies for support of national training conferences, discussed infra. under "technical assistance and training".

3. Policy Analysis and Recommendations

Unlike the areas of PAC organization and membership, the ultimate responsibility concerning budget matters cannot be left to the discretion of the PACs without statutory amendment because the Title I grant is to the LEA and it is responsible for deciding, with SEA concurrence, what is a "reasonable" and "necessary" expenditure. However, that is not to say that OE should not delimit or define the parameters of the LEAs definition concerning what constitutes a reasonable and necessary expense.

There are a number of forms these federal regulations could take. First, the OE regulations could specify the minimum activities for which monies must be budgeted. The regulation might read,

> Consistent with the cost principles set forth in 45 C.F.R. §100b.81, the application shall contain a PAC budget which shall include sufficient funds for at least the following activities: training (as defined in a regulation to be added, see _infra_ at page 811) travel to meetings, babysitting, costs for materials and supplies needed to prepare reports and minutes of meetings, costs of clerical assistance, costs for professional support, and other similar costs reasonably necessary for the proper functioning of the PAC and the avoidance of hardships that would otherwise be imposed on members if the proposed expenditures were not authorized .

A second approach would be to draft a general standard explaining what constitutes a minimal level of funding. The regulation might include the concept that the LEA must include a budget for PAC activities which are reasonable and necessary (a) to the proper functioning of the PAC, consistent with the PAC responsibilities and functions described *supra*., and the PAC training requirements set forth *infra*., and (b) avoidance of hardships that would otherwise be imposed on members of the council if the proposed expenditures were not authorized, (see OE Publication, *Parental Involvement in Title I, ESEA-Why? What? How?* at p. 12.

A third approach might be to combine approach two, i.e., specify certain costs and end the clause with a catch-all phrase similar to that appearing in approach two.

We recommend that the regulations be modified along the lines of the third approach. Experience would tend to indicate that an independent PAC with its own budget has a greater likelihood of effectively advising and monitoring the LEA. In order to meaningfully perform its duties, the PACs members must be trained, there must be a communication network established, and in some cases independent professional assistance must be retained. All of the factors require financial support.

With respect to the retention of independent professional assistance, we recommend that OE explain that under specified circumstances, such an expenditure would be reasonable and necessary. For example, it would be reasonable to hire a non-LEA consultant where the PAC disagreed with the design of the program or the selection criteria employed and the PACs objections were ignored.

VII. Access to Appropriate Information

A. Introduction and Overview of Federal Legal Framework

The Title I statute provides that the PACs must be provided with access to "appropriate information in accordance with regulations issued by the Commissioner. (Section 141(a)(14)(D)). The existing regulations describe two types of LEA responsibilities. Under the first, the LEA _must_ furnish to the PACs free of charge certain documents. The second responsibility relates to the availability of other documents. The following discussion concerns the types of documents which must be furnished to the PACs. This issue is important to consider because it is often the case that the only documents actually used by PACs are those documents actually furnished to the PACs.

The existing federal regulations require that the PAC be furnished free of charge copies of "Title I of the Act, the federal regulations, guidelines and criteria issued pursuant thereto, state Title I regulations and guidelines and the local educational agencies current application...". (§116.17(o)(2)(iii)) .

B. State Legal Framework

Based on the written materials reviewed by the Legal Standards Project, it appears that in at least one state included in the sample PACs are automatically furnished with information over and above that prescribed in the federal regulations. This state provides that each advisory council be furnished free of charge "periodic progress reports on the implementation of the currently approved program, orientation and training materials, information and documents needed for the effective involvement of each council in the planning, development, operation, and evaluation of the Title I products."

In a second state, the officially promulgated regulations concerning evaluation provide, in relevant part, that "each district and each school's program shall be evaluated at least annually...and the district governing board shall report the results of the annual evaluation to the district and school advisory committees...". The inservice materials prepared by the SEA which are used by SEA consultants and disseminated to the LEAs, adds that such evaluation reports must be disseminated to parents in "understandable language."

In one state which does not have an express policy requiring that monitoring/evaluation reports be automatically furnished to the PACs, several letters written by the State Title I Director suggest that such is, in fact, the state's unofficial policy.

> "In view of the fact that Section 116.17 of ESEA Title I regulations require that evaluation data be reviewed with the PAC, you are advised to share this letter and the evaluation team report with your committee. A copy of this letter has been forwarded to the chairman of your school district Title I PAC."

C. Policy Analysis and Recommendations

As stated above, the regulations distinguish between information which is available to parents but not necessarily supplied to PACs and information which the LEA is required to furnish free of charge to the PAC.

The present list of documents which must be transmitted to the PACs can be construed as essential to the PAC membership's ability to perform their various functions and duties, including "planning", "implementation" and "evaluation". The documents provided in accordance with the existing regulations includes two types. The first category includes documents containing the legal framework. The second category of documents consists of the programmatic framework; i.e., the project applications. Our recommendation is based on the premise that it is equally essential to the performance of the "implementation" and "evaluation" functions that PACs obtain reports submitted by and/or about the LEA's implementation of its Title I project. The reports contain information necessary to intelligently carrying out their responsibilities. This recommendation also takes the burden off the PAC to request these documents, without effecting any material burden on the LEA.

Specifically, we recommend that in addition to the information automatically distributed in accordance with the current regulations, each PAC member receive relevant training and orientation materials and that the chairperson of the district PAC automatically receive the following materials and that all PAC members be periodically notified of the availability of these materials:

- comparability report and worksheets;
- copy of all SEA and OE monitoring reports;
- copy of all SEA, HEWAA and GAO compliance and other audit reports;
- LEA evaluation report (written in plain and simple language)
- copy of all substantive correspondence between the SEA and OE concerning interpretations of Title I requirements;
- copy of all SEA written documents which are disseminated as a matter of course to the LEAs.

VIII. Complaint Resolution

A. Federal and State Legal Framework

The existing federal regulations require that the LEA has "adequate procedures to insure prompt response to complaints and suggestions and parent council" (§116.17 (o)(2)(vii)). In approximately half of the states, this requirement is interpreted as not requiring the existence of written procedures. In the remaining states, it is a requirement that written procedures either be maintained on file or filed with the SEA area staff.

One state has promulgated a grievance procedure which all LEAs in the state must adopt. The procedure is set forth below.

> PAC GRIEVANCE PROCEDURES
>
> (1) If by vote at a duly constituted meeting the parent advisory council raises doubt as to the effectiveness of a Title I proposal or project, the LEA shall provide a hearing for the council within fifteen (15) days of receipt of written notice from the advisory council chairperson. The LEA or the parent advisory council chairperson shall have the right of appeal to the superintendent of public instruction if the outcome of the local hearing is unsatisfactory. The superintendent shall conduct a hearing within fifteen (15) days of receipt of written notice from the LEA or the parent advisory council chairperson, and the decision of the superintendent shall be final.

B. Policy Analysis and Recommendations

We recommend that the federal regulations set forth minimum standards concerning the establishment of a complaint or grievance procedure. The regulation should include, at a minimum, the following standards,

- the procedure be in writing
- the steps in the procedure must be described (e.g., first step could be the particular school or LEA, second step SEA, third step OE)
- time limits must be established respecting resolution at each step
- local, state and federal personnel responsible for hearing and resolving complaints will be identified by name, title, address, and telephone number
- all correspondence or other written communications concerning the complaint must be kept in a central file, accessible to all parties
- the PAC must be notified in writing as to the resolution at each step, the reasons for the dicision and the right to appeal to the next step.

IX. Statewide PAC

Several states have established statewide parent advisory committees and one state has adopted a statewide advisory committee for compensatory education in general which has four parent representatives. One state has promulgated regulations concerning the functioning of the statewide PAC.

STATE ADVISORY COMMITTEE--PURPOSE

(1) The purpose of the state advisory committee (SAC) will be to advise the superintendent of public instruction in planning, developing, operating, and evaluating the state Title I program. Furthermore, it will facilitate communication between local parent advisory councils.

(2) Membership.

(a) The superintendent of public instruction shall select parent members from nominations submitted by local PAC's.

(b) The majority of the SAC shall consist of such parents as selected under subsection (a), above.

(c) The balance of the SAC shall consist of Title I administrators, teachers and aides, and representatives of other groups such as the state advisory committee on migrant education, social and health services, business and industry, and community groups.

(d) Bylaws shall be developed jointly by the SAC and the superintendent.

(e) Election of officers shall be conducted by the membership.

(f) All meetings of the SAC will be called by the superintendent.

(g) Members shall be reimbursed for travel and expenses to the extent permitted and consistent with the travel and per diem laws applicable to state employees.

X. Technical Assistance and Training for PACs

A. Introduction and Overview of the Federal Legal Framework

In a recent program directive (Inst. L210-2, February 27, 1976) concerning training for members of Title I Advisory Councils, OE stated, in the introductory paragraph:

> Title I, as amended by P.L. 93-380, requires in Section 141(a)(14)(C) that each local educational agency gives its district and school advisory councils' ...responsibility...for advising it in the planning for, and the implementation and evaluation of, such programs and projects..."such councils, therefore, must not only be properly constituted but also adequately prepared to perform their advisory functions. (emphasis added)

The underlined sentence restates an earlier series of statements concerning the impact of training and the provision of technical assistance to PACs appearing in the OE handbook entitled, Parental Involvement in Title I, ESEA - Why? What? How? One statement reads (page 10) "since Title I is a complicated program...it is essential that the LEA plan a training program for parent council members."

The OE Program Directive referred to above includes several specific statements clarifying the general OE policy that PACs must be adequately prepared to perform their advisory functions. First, OE suggests that any training provided be aimed "at such things as improving the council members' understanding of (a) the needs of educationally deprived children in the school district, (b) the application of the Title I requirements to the Title I program and projects on which the council must advise the LEA, and (c) the current Title I activities being conducted by that agency."

Second, the directive requires that the LEA include in its application a description of the training to be provided. The training activities described in the application must be "relevant to the needs" of the PACs.

Third, the directive sets forth a general test to be utilized by SEAs for determining whether to approve that section of the application concerning PAC training:

> the SEA may approve such training solely on the basis that it will contribute to the effectiveness of the participants as members of the particular councils and will be provided at a reasonable cost.

Finally, the OE directive attempts to explain, in general terms, the circumstances under which such training should be provided by the LEA and when such training might be provided by others.

> It has been the experience of most LEAs that local workshops and conferences planned by local council members and staff with the cooperation of the LEA staff offer the best possibility for ensuring that the training provided will be entirely relevant to the needs of the council....Any other types of training to be provided for council members with Title I funds should be justified on the basis that equally effective training cannot be readily provided at the local level and meet the cost principles contained in 45 C.F.R. Part 100, 100b, and the appendices thereto, such as being 'reasonable' and 'necessary' to carry out the functions of the advisory council.

B. State Legal Framework

It appears that at least three states have made the provision of training to PACs a requirement. In the first state, the officially promulgated regulations contain the following provision: "the district is required to provide training opportunities for members of the advisory committees".

The monitoring instrument used by the SEA in a second state provides, in relevant part, that there must exist evidence "concerning the parent advisory council involvement in in-service training designed to help it understand and improve its recommendations to the school district in the following areas...".

One state has prepared three major documents available to the parents. The first is a training manual for PACs; the second is a guide to the formation of building PACs (discussed *supra*.); and the third is a general handbook for PACs and parents describing the major components as well as the regulations and guidelines governing the program.

The training manual contains the following recommended practices:

1. A planning session in the spring when the application is being written;
2. Aplanning committee composed of representative parents from the previous year, from the current year, and other representatives from other groups in the community and the school;
3. An assessment (survey) of the training needs, as distinguished from the informational needs of PAC members;
4. A prioritization of the training need of parents; and
5. A training schedule that requires a series of training sessions with a follow-up component and dissemination to members of the PAC who are not directly involved in the training.

The handbook for PACs provides parents with a general description of the Title I programmatic requirements and then in a series of ten study units explains these requirements in further detail and explains the PACs' role with respect to each requirement.

C. Policy Analysis and Recommendations

We strongly recommend that the training of parents be made an express PAC requirement, consistent with OE's conclusion that councils must "not only be properly constituted but also adequately prepared to perform their advisory functions." The issue remains as to which organization or agency should be responsible for planning the workshops. Concomitant with this recommendations is the recommendations that the LEA provide, in its budget, sufficient resources to provide a meaningful training experience to the parents.

Generally, we support OE's position, as set forth in its recent program directive that, "it has been the experience of most LEAs that local workshops and conferences planned by local council members and staff with the cooperation of the LEAs staff offer the best possibility for ensuring" the most relevant training. Thus, the primary responsibility appears to rest with the PAC and the LEA. However, there may be workshops and conferences planned at the state or national level which offer a type of technical assistance not available at the local level. We recommend that the regulations permit the attendance at such conferences at the PACs discretion so long as the decision is reasonable and necessary. It would be the LEA's burden to show such attendance was unreasonable.

We also recommend that where the exigencies of the situation would prevent the PAC members from receiving adequate training from the LEA, that the PAC be permitted to spend a reasonable amount of money to hire non-LEA personnel to conduct the conferences. For example, if the LEA is openly hostile to parent involvement, it is unlikely that the LEA will provide adequate training so that parents can be actively involved.

XI. Application Form, Monitoring Instruments, and Recordkeeping Requirements Pertaining to Parent Involvement

A. Introduction and Overview of the Federal Legal Framework

The Title I requirements concerning PACs, as set forth in the existing federal regulations, provide that the LEA application must include a substantial amount of information documenting compliance with such requirements.

In general, each LEA application:

1. must "describe" how parents are consulted and involved in planning;
2. must set forth "specific plans" regarding continued involvement in further planning, development, and operation;
3. must include "sufficient information to enable the SEA" to determine, among other things,
    - (a) that the PAC has been furnished free of charge certain specified document and other relevant information is made available;
    - (b) that the PAC has been provided with plans for future projects and a description of the process

> of planning and projected times when each stage is to be completed;
>
> (c) that the PAC has had adequate opportunity to consider information regarding needs and various programs available to make recommendations;
>
> (d) that the PAC has reviewed evaluations and been informed of performance criteria;
>
> (e) that adequate procedures have been established for responding to complaints and suggestions;
>
> (f) that parents have been provided with an opportunity to present their views concerning the application.

In sum, each LEA application must "describe", set forth "specific plans", and "include sufficient information" to enable the SEA to make approximately 10 separate determinations regarding compliance with the PAC requirements.

B. State Legal Framework

Although based upon these uniform requirements, the application forms differed significantly from state to state. As discussed previously, many states have pursued a policy of permitting PACs or LEAs to submit a series of assurances in lieu of detailed information. However, other states have chosen to use open-ended questions, either alone or coupled with PAC assurance. For example, one state requires both the PAC and LEA to "sign off" a list of assurances, but also requires the LEA to complete a questionnaire which makes the following inquiries:

1. PARENTAL INVOLVEMENT

a. Give the name and mailing address for all members of your district advisory council.

b. Describe the procedures established whereby parents of children who participated in the preceding year or who will participate in the current year's program are, with their consent, identified so that they may be considered for membership on each council.

c. What are the established procedures for the nomination and selection of parents and other persons eligible for service on the councils?

d. Describe the procedures which will afford adequate notice to the parents and the general public in the agency's school district (or in the appropriate school attendance area of a school council) of the time, place, and method whereby such selection of advisory council members would be made.

e. State the procedure for informing and consulting with parents concerning ways in which parents can assist their children in realizing the benefits Title I services are intended to provide.

f. Describe any training for parents and parent council members to be provided including (1) the objectives, (2) the duration of the training, (3) the number of participants, (4) who will conduct the training, (5) the general organization, and (6) the estimated cost.

More generally, several other states require the LEA to describe how parents are selected for the PAC and how the PAC is involved in the operation and planning of the program. Other specific inquiries relate to the consideration given by the LEA to PAC recommendations, e.g.,

> Give examples of changes recommended by the parent or parents of Title I participants that is (sic) reflected in this project.

Finally, one state couples the use of assurances with a form for school level PAC "Self Reporting or Participation in Planning, Implementation, and Evaluation." Using this form, the individual members of the school level PAC must check off their participation in such areas as development of classroom materials, classroom volunteer work, tutoring, attendance at committee meetings, assistance in program monitoring and review, needs assessment, goal setting, budget preparation, school plan writing, and inservice training. These forms are updated annually prior to SEA on-site review (see discussion infra.).

In addition to SEA oversight of LEA applications, federal regulations (45 C.F.R. §100b.431) require that the SEA "constantly monitor performance" of Title I grant activities "to assure that adequate progress is being made towards achieving the goals of the grant". State review under this provision must be specific in nature; monitoring is required for "each function or activity of each grant".

Generally speaking, this requirement translates into SEA "on-site review" of LEA Title I activities.

In monitoring LEA projects, the SEA is provided additional assistance by the provisions of 45 C.F.R. §116.23, which obligates the LEAs to supply annual and other reports to the SEA and to keep accessible records assuring the accuracy of these reports. The SEA may determine what records the LEA is responsible for.

Given these broad guidelines, the states have established recordkeeping and monitoring procedures which vary in both content and formality.

For example, in terms of recordkeeping, most states have not formulated express requirements. Some states merely require that the LEAs provide documentation concerning PAC composition and functions for SEA on site review, but do not specify what constitutes adequate documentation. However, in one state, the monitoring instrument makes the following inquiries concerning PAC records: 227/

> (1) Does documentation exist concerning the function of this committee (such as a record of meetings, minutes, roster of council membership).

227/ Note that (1) and (2) above are taken from the HEW handbook, Title I ESEA - Conducting On-Site Visits.

> (2) Is there a record that the advisory council has been involved in the following activities: identification of needs, project planning and development, proposal review, implementation of project, on-site visits, project evaluation, and dissemination.
>
> (3) Is there documentation that the PAC has a procedure to submit comments to the SEA prior to application approval.

And in a second state, detailed regulations specify the records which must be kept concerning the district PAC, and, similarly, by the school level PAC.

> (1) The name and title of the person employed by the district who is responsible for organizing the District Advisory Committee.
>
> (2) A list of committee members by name, address, and telephone number of each of the categories of representation identified in 1.1.1; a ledger recording changes in membership.
>
> (3) The schedule and information on content of training activities for committee members.
>
> (4) A schedule of committee meeting dates and locations of meetings.
>
> (5) A description of the communication channels established for providing information to the committee and for bringing recommendations of the committee into the decision-making process.

> (6) A copy of the major recommendations made or endorsed by the committee in each step of the planning process.

As is the case with recordkeeping, state monitoring instruments and procedures are far from uniform. Most state monitoring instruments ask only a few very general questions concerning parent involvement. Nevertheless, a few states have monitoring instruments and procedures which direct SEA evaluators to specific inquiries.

For example, one state which relies on a series of LEA assurances in its application form has a monitoring instrument which contains the following detailed questions and check offs:

"Parent council or councils are functioning according to the lines."

"Minutes of the council meetings are on file."

"Council members have access to required documents and are aware of the availability."

"Are parent visitors invited to staff meetings?"

"Are there indications that the parent visitor is visiting families of children participating in Title I activities?"

"Are there meetings scheduled for parents of eligible children?"

"Are parents encouraged to: visit school, meet with staff, attend faculty meetings, plan school activities?"

"How should parents arrange to meet with Title I teachers? Through the office, through parent visitor, with teacher?"

"How would you recommend parents help improve instruction at your school? Volunteer for committees-school activities, organize school parents, participation in workshops, other?"

"Parent advisory council or councils are established as required by regulation."

"Formal meetings have been held for planning purposes and to discuss implementation."

"Parents, in general, have had input into the planning of the program."

"Parents, in general, have been involved in the implementation and operation of the program."

"LEA has responded to recommendations of the PAC."

"PAC has access to copies of the required documents and has been made aware of their availability.

"Minutes of formal PAC meetings are on file and are generally available."

"General requirements relative to PAC have been met."

Similarly, a second state whose application form contains general LEA assurances has a monitoring instrument which presents detailed and extensive questions concerning compliance with federal regulations. The instrument is several pages long, but a sampling of questions is set forth below. In contrast to its non-specific application form, note that the SEA monitoring form reiterates the precise criteria set forth in the federal regulations, thereby assuring that the SEA will examine compliance with each and every requirement.

		YES	NO	REMARKS	N/A
4. The local educational agency has only one school at which Title I services are provided or two or more such schools with a combined enrollment of less than 1,000 children and has exercised its option to have only a district advisory council.	4.	____	____	______	____
5. Each local educational agency has included in its application sufficient information to enable the State agency to make the following determinations:	5.	____	____	______	____
a. That each council free of charge copies of the Title I of the Act, the Federal regulations, guidelines and criteria issues pursuant thereto, State Title I regulations and guidelines, the local educational agency's current application, periodic progress reports on the implementation of the currently approved Title I program, appropriate orientation and training materials, and such other information and documents (including prior applications for Title I projects and evaluations thereof) as may be needed for the effective involvement of each council in the planning, development, opera-	a.	____	____	______	____

	YES	NO	REMARKS	N/A
a. (continued) a. tion, and evaluation of projects under Title I;				
b. That the local educational agency has provided each council with the agency's plans for future Title I projects and programs, together with a description of the process of planning and developing those projects and programs, and the projected times at which each stage of the process will start and be completed; b.				
c. That each council had an adequate opportunity to consider the special educational needs of the educationally deprived children residing in the project area (or areas), and the various programs available to meet those needs, and to make recommendations concerning those needs which should be addressed through the Title I program and similar programs; c.				

Monitoring of Title I activities does not always involve SEA consultation with or questioning of PAC members and/or other parents. The amount of contact between evaluators and parents varies from state to state. In some states, parents must be contacted. In others, only one or two partents need be contacted; evaluators will meet with parents upon request only; or parent contact is a matter for individual determination by the evaluator. And, uniquely in one state, as discussed previously, each PAC member must "self-report" on his/her activities just prior to on site review.

(State practices involving the availability of SEA monitoring reports to PACs and SEA encouragement of PAC participation in monitoring activities have been discussed in previous sections.)

C. Policy Analysis and Recommendations

As explained in a previous section, we have recommended that LEAs be permitted to submit "sign off" documents in application forms to the SEA, provided that they meet certain strict conditions (see p.753). In this manner, the administrative ease of using such documents would be maintained, while detailed information regarding PAC activities would be provided to enable effective SEA oversight.

However, in making this recommendation, we in no way intend that the OE should limit the states in their choice of application forms. The use of open ended questions and PAC self reporting forms, either alone or in conjunction with a certification, should not be discouraged. Rather, the proper emphasis should be on the content of the application forms--whether they actually do "describe", set forth "specific plans", and contain "sufficient information" for an independent SEA determination of compliance. Only in this manner may SEAs meaningfully give assurances of LEA compliance to OE as required under 45 C.F.R. §116.34(a) and §116.31(c).

In terms of recordkeeping, the states, for the most part, have not exercised their ability to set requirements for LEAs under 45 C.F.R. §116.23. However, LEA records constitute an important means of verifying project compliance with parent involvement requirements, and additionally serve as a constant reminder to the LEAs of what those requirements are. For these reasons, we recommend that OE incorporate into its regulations the following recordkeeping requirements. These requirements should merely be provided as a minimum standard; the SEA should retain its present ability to require additional recordkeeping which it deems "necessary".

- name and title of person employed by the district who has the authority to address complaints, concerns, and suggestions made by PACs
- a description of the communication channels established for providing information to the PACs and acting upon PAC ideas
- a list of committee members by name, address and telephone number
- a schedule and information concerning the content of the training activities for PAC members
- schedule (time-line) of critical dates, including schedule of committee meeting
- minutes of PAC meetings

Finally, due to the almost complete absence of detailed inquiries into the requirements of parent involvement in SEA monitoring instruments, we would recommend that

OE promulgate regulations which would require SEA monitoring of parent involvement in a comprehensive and detailed manner. Consultation with the PAC and other parents during the course of monitoring should be made an essential aspect of SEA monitoring procedures, in order to ensure consideration of parent view points. The regulation might take the following form:

> The state educational agency shall establish monitoring procedures which provide, at a minimum, for the following:
>
> ...as to parent involvement:
>
> (i) That the local educational agency has taken appropriate measures to insure the selection of parents to the parent council who are representative (a) of the children eligible to be served (including such children enrolled in private schools) and (b) of the attendance areas to be included in the Title I program of such agency;
>
> (ii) That each member of the council has been furnished free of charge copies of Title I of the Act, the Federal regulations, guidelines, and criteria issued pursuant thereto; State Title I regulations and guidelines, the local educational agency's current application; and

training materials prepared by the SEA or LEA. In addition the following documents shall be furnished to the chairperson of the district-wide PAC; comparability report and worksheets, SEA and HEWAA compliance audits, LEA evaluation reports, SEA prepared training materials, copies of all correspondence between the SEA and OE concerning Title I interpretations, and copies of SEA written documents disseminated as a matter of course to the LEAs; and that such other information as may be needed for the effective involvement of the council in the planning, development, operation, and evaluation of projects under said Title I will also be made available to the council;

(iii) That the local educational agency has provided the parent council with the agency's plans for future Title I projects and programs, together with a description of the process of planning and developing those projects and programs, and the projected times at which each stage of the process will start and be completed;

(iv) That the parent council has had an adequate opportunity to consider the information available concerning the special educational needs of the educationally deprived children residing in the project areas, and the various programs available to meet those needs, and to make recommendations concerning those needs which should be addressed through the Title I program and similar programs;

(v) That the parent council has had an opportunity to review evaluations of prior Title I programs and has been informed of the performance criteria by which the proposed program is to be evaluated;

(vi) That the Title I program in each project area includes specific provisions for informing and consulting with parents concerning the services to be provided for their children under Title I of the Act and the ways in which such parents can assist their children in realizing the benefits those services are intended to provide;

(vii) That the local educational agency has adequate procedures to insure prompt response to complaints and suggestions from parents and parent council;

(viii) That all parents of children to be served have had an opportunity to present their views concerning the application to the appropriate school personnel, and that the parent council has had an opportunity to submit comments to the state educational agency concerning the application at the time it is submitted, which comments the state educational agency shall consider in determining whether or not the application shall be approved.

(ix) That parents of children to be served were consulted and involved in the planning, implementation and evaluation of the project, including

(a) the selection of project areas and program participants consistent with federal guidelines;

(b) a review of the prior year's evaluation which is written in terms understandable to the average PAC member;

(c) conducting the needs assessment;

(d) analysis of the assessment for purposes of setting program goals and objectives;

(e) the designing of the program;

(f) the establishment of program objectives;

(g) the review of the application prior to submission including revisions and modifications;

(h) other specific activities, e.g., visiting Title I classes, monitoring activities, inservice training, etc.

(i) the design of the evaluation instrument including the decision concerning program objectives, standards used and criteria for determining success.

> (x) That parents are involved and consulted during the state education agency's monitoring described on the previous page.
>
> (xi) That an LEA staff person has been appointed as PAC liason to facilitate PAC communication of its observations, complaints, and suggestions.

These requirements would formalize the detailed approach to monitoring taken by the second state mentioned previously and would enable more meaningful SEA review of all aspects of parent involvement.

CHAPTER 14

COORDINATION

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CHAPTER 14
COORDINATION

I. Introduction

A. Overview of the Federal Legal Framework

The original Title I statute (P.L. 89-10) contained a provision requiring the coordination of Title I programs with Community Action Programs funded under Title II of the Economic Opportunity Act of 1964. Although the Title I statute, as amended, no longer contains a coordination requirement, the regulations issued by OE have retained the requirement.

The federal regulations explain that the purpose of the coordination requirement is "to avoid a duplication of benefits and to assure the most effective use of funds under Title I of the Act toward meeting the special educational needs of educationally deprived children." (45 C.F.R. §116.24(a)(1974))

The regulations require that the LEA demonstrate that coordination with other federal and state programs administered by other federal and state agencies will occur both in the "development" as well as the "operation" of the Title I program. The regulation also clarifies the extent of coordination permissible by providing that funds from different sources may be used simultaneously to finance identifiable portions of a

single project; however, the actual commingling of funds from various sources in a single account is impermissible.
(45 C.F.R. §116.24(c)(1974))

B. Organization and Purposes of this Chapter and Major Recommendations

This chapter will describe and analyze the federal and state legal frameworks concerning the coordination provisions, including a discussion of the meaning of the terms "demonstrate" coordination in the "development" and "operation" of Title I programs, the application of the provision to the inclusion of support services under Title I, and finally the significance of the "simultaneous" use concept.

It should be noted that probably the most significant issues of coordination concern (a) the interrelationship between Title I and state compensatory education programs, and (b) the interrelationship between various federal categorical aid programs generally applicable to the same category of children.

With respect to the former issue, we have developed a separate paper directed primarily to the interrelationship between Title I and state compensatory education programs; therefore, this chapter will not be concerned with this issue.

With respect to the second issue, i.e., coordination between federal programs, our NIE mandate did not cover this broad question. Other NIE contractors may be focusing on this question.

Thus, our recommendations contained in this paper simply relate to fine-tuning or clarifying the existing regulation as it relates primarily to the coordination of Title I with other state and federal agencies offering life support services. We recommend that the criteria presently set forth in the OE program guides and informal legal framework be included in the officially promulgated regulations. The criteria provide:

(1) the provision of life support services must be part of a comprehensive program designed to meet the special educational needs of children;

(2) a specific need for such services has been shown;

(3) only participating children actually receive the life support benefits, and

(4) all other resources for supportive services have been exhausted.

II. Defining the Scope of the Coordination Requirement

A. Introduction

This section of the paper will describe the federal and state legal frameworks concerning certain of the significant aspects of the coordination requirement identified during our visits in ten states. Following these descriptions, we will set forth the Project's recommendations.

B. "Demonstrating" Coordination in the "Development" and "Operation" of Title I Programs

1. Federal Legal Framework

The existing federal regulations provide that the LEA must "demonstrate" in its application that it has coordinated its efforts with other federal and state agencies in the "development" and "operation" of Title I programs.

Specifically, the regulation provides (45 C.F.R. §116.24 (a)(1974)):

> (a) Each application for a grant under Title I of the Act shall demonstrate that in the development of the program or project, the applicant has taken into consideration those benefits that are or may be made available for the affected children through various agencies of the Federal Government, as well as through State and local agencies and private nonprofit organizations, and has coordinated the program or project with programs available through such agencies or organizations, including community action programs under Title II (42 U.S.C. 2781-2831) of the Economic Opportunity Act of 1964 and shall further demonstrate that there will be similar coordination in the operation of the program or project.

Section 3.1 of Program Guide # 44 goes further by suggesting that each

> Title I application should present sufficient information to show that the resources available to the [LEA] and to other local agencies have been considered in planning the program, and that where appropriate those resources have been committed to certain program objectives. The application should show not only that the resources of other programs were considered in planning but also that there will be appropriate coordination of related services in the actual operation of a comprehensive program.

2. State Legal Framework

Most of the states included in our survey have not developed comprehensive policies explaining the above described federal requirements. Set forth below are examples of the policies which the states have developed.

In one state, the SEA explains that:

> The LEA should be familiar with the provisions of other Federal Acts and programs such as Civil Rights Act, Economic Opportunity Act, Manpower Development and Training Act, Vocational Education Act, and others; and should work in cooperation with administrators of all other Federal, State, and local programs so that no conflict or duplication shall occur.

In a second state, the Title I application requires that community action agencies and other agencies providing services in coordination with a Title I program sign an assurance that:

> (a) the agency was consulted 'on the analysis of needs of children in low-income areas;'
> (b) was consulted 'on resources available to meet those needs;'
> (c) 'participated in planning for use of available resources to meet the needs' of eligible children.

In addition, the agency must specify the specific services to be coordinated with the LEA's Title I program.

A third state includes in its application a list of agencies which may provide resources for eligible children. The LEA must check with respect to each agency (a) whether resources are available, (b) whether resources are to be used, and (c) a description of how resources are to be used.

The agencies in the list include, among other agencies, parent organizations, civic groups, service organizations, recreational agencies, welfare department, family service agencies, child protective agencies, and probationary agencies.

3. Policy Analysis and Recommendations

Our interviews with state personnel revealed that coordination was not viewed as a major requirement. One state Title I Director explained that SEAs develop policies in those areas that OE has indicated are priorities, and under this theory it is natural that states have not developed coordination policies since they have received little guidance from OE.

Generally speaking, state personnel have focused on coordination at application review time, and have established informal rules of coordination based on the scarcity of Title I dollars and a desire to expend Title I monies for education services not provided by other groups.

It appears that most states do not now require that LEAs demonstrate that coordination has occurred and will continue to occur. However, Title I personnel can and do pick up clues that such coordination has not taken place from budget requests. Support service requests in particular trigger questions to the LEAs.

The Legal Standards Project recommends that the Title I statute be amended to provide a statutory base for the coordination requirement. In addition, the regulations should specify the minimum information that will allow the SEA to determine that coordination has occurred. It is suggested that each application contain: 1) a page similar to the third state's application form, described above, which lists a variety of possible local resources and asks the LEA to indicate whether such resource is available, how it will be utilized and the manner of utilization, and 2) a list of all other special federal and state programs operating in the district and a description of attempted coordination with each of these.

Furthermore, the federal requirement that the application reflect consideration of suggestions from other agencies requires that, at a minimum, LEAs should describe on their application the efforts they made to solicit such comments.

The LEA must certify that it has attempted to exhaust other sources of funds and to the extent other sources are found to exist, but the LEA still includes a request for Title I funds for that service; it must certify that it would cost the LEA more time and energy to get the money elsewhere.

C. Support Services

1. Introduction

Probably the central issue concerning the application of the coordination requiremenets discussed within the context of this paper is the question of under what circumstandes Title I funds may be used for life support services. Set forth below is a brief description of the federal and state legal frameworks describing this issue. It should be noted that a similar discussion appears in the chapter concerning general aid.

2. Federal Legal Framework

On August 14, 1970, OE issued program Guide # 60 concerning the use of Title I funds to provide clothing for eligible children. This guide was written, in part, as a response to welfare rights groups advocating such a policy.

The guideline provided, among other things, several criteria for determining the circumstances under which an LEA might approve the purchase of clothing under Title I:

(1) the provision of clothing is a part of a comprehensive program designed to meet the special educational needs of eligible children;

(2) the clothing is provided only to children participating in educational activities;

(3) evidence is provided that all resources for supportive services have been exhausted.

One month after the issuance of the above guideline, OE issued Program Guide # 60A which "reaffirmed that Title I is an educational, not a welfare program." OE then clarified Guide # 60, and concluded with the following paragraph:

> It has come to my attention that in a number of states, project applications are being received involving greatly increased expenditures of Title I funds for clothing, which, if approved, would jeopardize the basic nature of the Title I program . . . . In order to avoid breach of assurances given by State and local educational agencies in this regard, state agencies should not approve any increase over previous years in the proportion of any LEA's expenditures attributable to clothing.

Less than one month later (October 5, 1970) OE rescinded the advice contained in the above paragraph. However, the original criteria were retained.

In sum, the criteria originally set forth with respect to clothing have become the basic criteria used with respect to all supportive services:

(1) the provision of life support services must be part of a comprehensive program designed to meet the special educational needs of children;

(2) a specific need for such services has been shown;

(3) only participating children actually receive the life support services; and

(4) all other resources for supportive services have been exhausted.

Recent letters written by OE to SEA Title I Directors confirms this policy and further clarifies the "exhaustion" requirement. Thus, in response to the question whether a child who was educationally deprived but who was not economically deprived could receive Title I funds for supportive services, OE responded in the negative, explaining that, "such services are deemed to be available if they can be provided . . . by the child's family."

3. State Legal Framework

As explained in Chapter 12 , all of the states included in our survey pursued policies similar to those enunciated by OE above. One state Title I Director, however, explained that he would approve a Title I expenditure for a supportive service available from other sources "if obtaining the service from the other source would be counter-productively difficult."

4. Policy Analysis and Recommendations

We recommend that the coordination regulations be clarified to include the concepts set forth above in the clothing guidelines and OE's informal legal framework. Further, OE should indicate that the availability of alternative sources of funding should not be construed as automatically prohibiting the expenditure of Title I funds. What is required is a reasonable attempt to obtain alternative sources of funding.

D. Simultaneous Use of Title I and Funds From Other Programs, and the Prohibition Against the Commingling of Funds

1. Introduction

The question of whether Title I may be coordinated with other federal and state programs in the development of a single project is of central importance to an LEA which is primarily concerned with the adequacy of the program design, rather than which funding source is used. This question primarily arises with respect to the coordination between Title I and state compensatory education programs.

Because of the importance of this issue, we have developed a separate paper to analyze this question and other questions concerning the interrelationship between Title I and state compensatory education programs. Set forth below is the federal legal framework concerning this issue. We did not obtain sufficiently meaningful responses from the states concerning this question to include a separate section.

2. Federal Legal Framework

The federal regulations generally permit the simultaneous use of Title I funds and funds from other sources for a single project so long as each source funds an identifiable portion of the project and so long as the sources of funds are not commingled in a separate account.

Specifically, the regulation (45 C.F.R. §116.24(c)(1974)) provides:

> In the coordination with other programs the commingling of funds under Title I of the Act with funds under such other programs is not authorized, but the simultaneous use of funds under each of those programs to finance identifiable portions of a single project is permitted.

3. Policy Analysis and Recommendations

We recommend that this basic principle be retained and clarified. It is important that LEAs understand the various alternatives available to them for coordinating various funding sources in the development and operation of a single project. OE must explain what it means by "simultaneous use of" and "identifiable portions of a single project". Our specific recommendations concerning these issues appear elsewhere in the state compensatory education paper.